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Supreme Court, U.S.
FILED

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No.

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1996**

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CITIZENS' UTILITY RATEPAYER BOARD,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent.

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**On Petition for Writ of Certiorari**
**to the Supreme Court of the State of Kansas**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state violates the Fourteenth Amendment's due process guarantee when it statutorily provides parties a right to a hearing and then withdraws that right by allowing the matter to be determined by default caused by the inaction of a state agency, rather than on the merits?

## LIST OF PARTIES REQUIRED PURSUANT TO RULE 14(b)

In addition to the parties set forth in the caption of this Petition, the following were parties to the proceeding in the court below:

Cities of Ottawa and Paola, Kansas
City of Overland Park, Kansas
Jefferson County, Kansas
Kansas Attorney General Carla Stovall
Kansas Corporation Commission
Miami Pipeline Company
Panhandle Eastern Pipeline Company
Western Resources, Inc.
Williams Natural Gas Company

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Citizens' Utility Ratepayer Board ("CURB"), seeks a writ of certiorari to review an order of the Supreme Court of the State of Kansas, denying review of an order of the Court of Appeals of the State of Kansas which held that the failure of the Corporation Commission of the State of Kansas ("KCC") to reach a decision on the merits of certain public utility applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) forever barred Kansas ratepayers from having the applications considered on their merits.

## OPINIONS BELOW

The unpublished opinion of the Supreme Court of the State of Kansas, entered September 9, 1996, is reprinted at Appendix A. The opinion of the Court of Appeals of the State of Kansas, entered May 17, 1996, is published as Kansas Pipeline Partnership v. State Corp. Comm'n, 916 P.2d 76 (Kan. Ct. App. 1996) and is reprinted at Appendix B.

## JURISDICTION

The Supreme Court of the State of Kansas entered its order on September 9, 1996. This Petition for Writ of Certiorari is being docketed within ninety days from the entry of the order of the Supreme Court of the State of Kansas pursuant to Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1993).

The provisions of 28 U.S.C. § 2403(b) may apply. The Attorney General of the State of Kansas and the Kansas Corporation Commission are being served with three copies of the Petition pursuant to Rule 29.4(c).

## RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The specific text of the following constitutional and statutory authorities are included at Appendices G through I:

U.S. Const. amend. XIV
Kan. Stat. Ann. § 66-117 (1995)
Kan. Stat. Ann. § 66-1223 (1995)

## STATEMENT OF THE CASE

This case involves an appeal from a decision of the KCC in which Kansas Pipeline Partnership ("KPP") sought approval of certain gas purchase and transportation contracts entered into with Western Resources, Inc. ("WRI"). Extensive hearings were conducted by the KCC over a period of several weeks. Prior to the technical hearings, comprehensive discovery was served by the applicants and intervenors, including KPP, KCC Staff, CURB, WRI and Williams Natural Gas Company ("WNG"). The contracts were opposed by KCC Staff, CURB, WNG and others.

At the conclusion of the technical hearings, the parties were ordered to file post-hearing briefs. Subsequently, KCC Staff filed for and was granted a stay of proceedings. The stay was granted because the Federal Energy Regulatory Commission ("FERC") had issued an order providing that FERC had jurisdiction over the subject contracts because KPP constituted an interstate pipeline.[1] The KCC ruled that the 240-day period within which the KCC was required to act on the subject contracts under Kan. Stat. Ann. § 66-117(b), to the extent applicable, was restarted in light of the FERC order.[2] Kan. Stat. Ann. § 66-117(b) is reprinted at Appendix H.

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[1]KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61, 160 (1995).

[2]The KCC orders which provide the basis for the Lower Courts' decision are reprinted at Appendices C through F.

KPP appealed the KCC decision to the Court of Appeals of the State of Kansas. KPP argued on appeal that the contracts had gone into effect by operation of law since the KCC had not acted timely on the applications. The Court of Appeals held that the KCC had not acted on the subject applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) and therefore, the contracts were deemed approved without any consideration of the merits of such contracts. Appendix B.

CURB first raised its constitutional due process arguments in its Petition for Review in the Supreme Court of the State of Kansas. Appendix J. The Kansas Supreme Court denied the Petition without considering the constitutional due process arguments in its September 9, 1996 order. Appendix A. The application of Kan. Stat. Ann. § 66-117(b) by the Lower Courts violates the fundamental due process rights of Kansas ratepayers. This Court should grant this Petition and restore these rights to the affected ratepayers.

## REASONS FOR GRANTING THE WRIT

### Summary of Argument

CURB represents the interests of residential and small commercial ratepayers in the State of Kansas. The five contracts which will go into effect by operation of law if the Lower Courts' decision is allowed to stand will be detrimental to these ratepayers. While CURB has been statutorily authorized to represent and protect the interests of such ratepayers, the actions of the Lower Courts effectively negate ratepayers' rights to notice and hearing on the contracts and subjects ratepayers to the increased costs

associated with the contracts through no fault of CURB or ratepayers. The inaction of the KCC should not cause unsuspecting ratepayers to be subject to these contracts for periods as long as twenty years. Procedural due process requires that CURB and its constituency be entitled to notice and a meaningful hearing on the disputed contracts. CURB and Kansas ratepayers are entitled to have the KCC consider the merits of the contracts.

## I. KAN. STAT. ANN. § 66-117(b) AND ITS APPLICATION BY THE LOWER COURTS VIOLATE THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

### A. CURB and the Ratepayers it Represents Are Entitled to Due Process of Law.

The decisions of the Lower Courts have denied CURB and the ratepayers its represents their statutory right to inquire into the propriety of the five gas purchase and transportation contracts the cost of which will ultimately be borne directly by such ratepayers. The application of Kan. Stat. Ann. § 66-117(b) by the Lower Courts has denied ratepayers their fundamental due process right to notice and a meaningful hearing on the contracts.[3]

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[3]The decisions of the Lower Courts reach beyond the Kansas borders. It will serve as authority for other states who have enacted comparable legislation. See, Minn. Stat. § 216B.16(2)(a) (1995); Mo. Ann. Stat. § 392.230(5) (Vernon 1996); S.C. Code Ann. § 58-5-240(E) (Law. Co-op. 1995); Tex. Corps. & Ass'ns Code Ann. §§ 2.212(d), 3.211(d), 5.08(d) (West 1995); Utah Code Ann. § 54-7-

The Fourteenth Amendment to the U.S. Constitution provides "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .". Appendix G. Due process requires, when liberty or property rights protected by the Fourteenth Amendment are involved, the right to a hearing prior to taking.[4] CURB and the ratepayers it represents have been precluded by the Lower Courts' application of Kan. Stat. Ann. § 66-117(b) from pursuing a meaningful hearing and have thus been deprived of a protected property interest specifically created by the Kansas legislature.

### B. CURB and Kansas Ratepayers Have a Protected Property Interest.

CURB is a creature of statute and through its consumer counsel is specifically empowered under Kan. Stat. Ann. § 66-1223 to: (1) represent residential and small commercial ratepayers before the State Corporation Commission; (2) function as an official intervenor in cases filed with the State Corporation Commission, including rate increase requests; (3) initiate actions before the State Corporation Commission; (4) represent residential and commercial ratepayers who file formal utility complaints with the State Corporation Commission; (5) intervene in formal complaint cases which would affect ratepayers; and (6) make

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12(3)(c) (1996); Vt. Stat. Ann. tit. 30, § 227(a) (1996); Wis. Stat. § 196.19(d) (1994). Consequently, the decision is important from a national perspective.

[4]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

application for a rehearing or seek judicial review of any order or decision of the State Corporation Commission. Appendix I.

The obvious purpose of the authorizing legislation was to create an effective advocate for residential and small commercial ratepayers in utility proceedings before the KCC. CURB has been empowered statutorily to pursue causes on behalf of ratepayers whenever ratepayers would be adversely affected by a decision of the KCC. This authority to commence actions on behalf of ratepayers rises to the level of a protected property interest for ratepayers who otherwise would not have the financial resources to commence such actions on an individual basis.

Prior decisions from this Court have provided guidance as to the scope of protected property interests. The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." A cause of action is a species of property protected by the Fourteenth Amendment's due process clause.[5] The decisions of the Lower Courts have extinguished the statutory right of ratepayers to participate in the KCC proceedings without due process of law.

The deprivation here is particularly egregious when one considers that CURB's statutory right to pursue causes of action on behalf of ratepayers is abrogated through no fault of CURB or the ratepayers it represents. The Lower Courts failed to recognize that it is ratepayers and not the KCC who

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[5]Mullane, 339 U.S. at 311; Logan v. Zimmerman Brush Co., et al., 455 U.S. 422, 428 (1982).

ultimately will suffer the consequences of the contracts if allowed to go into effect. The Lower Courts' actions deprive CURB of the right to challenge the need and propriety of the contracts. Kan. Stat. Ann. § 66-117(b) and its application by the Lower Courts results in constitutional harm being inflicted on innocent ratepayers. The unconstitutional deprivation of fundamental due process rights resulting from the Lower Courts' decisions should be remedied by this Court.

### C. Due Process Dictates that CURB Be Allowed a Meaningful Hearing on the Disputed Contracts.

Property rights once conferred by the legislature cannot be withdrawn without due process of law. The Fourteenth Amendment requires as a matter of due process an opportunity to be heard granted at a meaningful time and in a meaningful manner.[6] While the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. The adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.[7]

CURB and its constituency were deprived of their statutory right to intervene and participate in an administrative proceeding conducted solely for the purpose of determining the prudency of certain gas contracts the burden

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[6]Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

[7]Vitek v. Jones, 445 U.S. 480, 490-491, n. 6 (1980).

of which falls on ratepayers. The Lower Courts' endorsement of Kan. Stat. Ann. § 66-117(b) deprives ratepayers of a property interest without due process of law. Some form of hearing is required before the owner of the property interest is finally deprived of such interest.[8]

In Logan v. Zimmerman Brush Co., et al., 455 U.S. 422 (1982), this Court held that a state may not terminate a complaining party's cause of action because a state official, for reasons beyond the complaining party's control, failed to comply with a statutorily mandated procedure. In Logan, the complaining party brought an employment-related claim under the Illinois Fair Employment Practices Act. That Act provided that the Illinois Fair Employment Practices Commission had 120 days within which to convene a fact finding conference designed to obtain evidence, ascertain the position of the parties, and explore the possibility of a negotiated settlement. It was discovered that the conference had inadvertently been scheduled after the expiration of the 120-day period. The complaining party's cause of action was dismissed by the Lower Court. The 120-day period was deemed to be jurisdictional by the Lower Court.

Citing Mullane, the Logan Court held that the complaining party's cause of action was a property interest protected by the Fourteenth Amendment. The Logan Court held that the complaining party was entitled to an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Since the complaining party was denied that opportunity, the Court reversed. It was determined by the Court that the

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[8]Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

complaining party was entitled to have his complaint considered on its merits.

This case presents facts remarkably similar to those in Logan. Here the legislature created a statutory cause of action through CURB to protect and advance the interests of residential and small commercial ratepayers. CURB initiated such an action by intervening in the proceeding before the KCC. Ratepayers' rights to have a determination on the merits of the case were then removed by the Lower Courts, not because of any action of CURB, but by the inaction of the KCC to decide the case within the arbitrary period specified by Kan. Stat. Ann. § 66-117(b). The decision of the Lower Courts effectively denies ratepayers their cause of action without due process of law. There is no meaningful distinction between the cause of action at issue in Logan and the ratepayers' right to use the adjudicatory procedures before the KCC to challenge the propriety of the five gas purchase and transportation contacts.

## CONCLUSION

Kan. Stat. Ann. § 66-117(b) is unconstitutional because it denies ratepayers their constitutional right to notice and a meaningful hearing. This Court should grant CURB's Petition and, like the Logan Court, determine that ratepayers' right to use the KCC adjudicatory process is a species of

property protected by the Due Process Clause. CURB is entitled to have the KCC consider the merits of the disputed contracts.

Respectfully submitted,

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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# APPENDIX A

SUPREME COURT ORDER DISTRICT CASE NO.

IN THE SUPREME COURT

OF THE STATE OF KANSAS

DAVID P BATOW
WILLIAMS NATURAL GAS COMPANY
LEGAL DEPT 36TH FL
P O BOX 3288
TULSA OK 74101

KANSAS PIPELINE PARTNERSHIP, PETITIONER,
V No. 96-75918-AS
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, RESPONDENT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION'S FOR REVIEW BY CURB, KCC & WILLIAMS NATURAL GAS.
CONSIDERED BY THE COURT AND DENIED.
RESPONSES NOTED.

KCC DOCKET NOS. 192,506-U AND 192,507-U

DATE: 09/09/96.

CAROL G. GREEN
CLERK

# APPENDIX B

No. 75,918

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KANSAS PIPELINE PARTNERSHIP,
*Appellant,*

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
*Appellee.*

SYLLABUS BY THE COURT

1. The Court of Appeals has exclusive jurisdiction to review any action of the Kansas Corporation Commission arising from a rate hearing. K.S.A. 1995 Supp. 66-118a(b).

2. The order under review in this case constitutes a final agency action subject to judicial review.

3. K.S.A. 77-607 and K.S.A. 77-608 are construed and applied.

4. K.S.A. 1995 Supp. 66-117 is construed and applied.

5. The scope of review of an agency action is set forth in K.S.A. 77-621, which codified principles long recognized by Kansas courts.

6. The cardinal rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.

7. If a general and a specific statute both apply to a given situation, they should be read together and harmonized when possible.

8. The Kansas Corporation Commission's authority is limited to that conferred by statute.

9. A final order is one which terminates litigation on the merits and leaves nothing to be done except to enforce the result. In an agency setting, a final order needs to be more than a mere procedural ruling.

10. In an administrative setting, finality should be interpreted in a pragmatic way.

11. An agency's interpretation of a statute should be given deference, but when reviewing a question of law, an appellate court may substitute its judgment for that of the agency.

12. The legislature is presumed to understand the meaning of the words it uses and the procedures it establishes.

13. When a statute is clear and unambiguous, a court must give effect to the legislature's intent as expressed, rather than determine what the law should or should not be.

14. An amendment involves a change or modification and suggests an action by one of the parties to change, correct, or revise.

15. Ordinarily, a change in statutory language is presumed to result from a legislative purpose to change its

effect, but the presumption is of little force if an amendment is adopted as part of a general, technical revision to a statute.

16. Under the peculiar facts of this case, the relief sought by Kansas Pipeline Partnership was deemed approved by operation of law when the Kansas Corporation Commission failed to finally act within 240 days of the application and when neither of the exceptions of K.S.A. 1995 Supp. 66-117(b) applies.

Appeal from the Kansas Corporation Commission. Opinion filed May 17, 1996. Reversed.

James P. Zakoura, Richard W. Hird, and David J. Roberts, of Smithyman & Zakoura, Chartered, of Overland Park, and Fred J. Logan, Jr., of Logan & Logan, L.C., of Prairie Village, for appellant.

Larry M. Cowger, of Kansas Corporation Commission, for appellee.

Mark A. Burghart and W. Robert Alderson, of Alderson, Alderson & Montgomery, L.L.C., of Topeka, for intervenor Citizens' Utility Ratepayer Board.

John C. Frieden and Kevin M. Fowler, of Frieden, Haynes & Forbes, of Topeka, and David P. Batow and Gary W. Boyle, of Williams Natural Gas Company, of Tulsa, Oklahoma, for intervenor Williams Natural Gas Company.

Before ELLIOTT, P.J., ROYSE and KNUDSON, JJ.

ELLIOTT, J.: Kansas Pipeline Partnership (KPP) and Western Resources, Inc., (WRI) entered into natural gas sales and transportation contracts. KPP submitted the contracts to the Kansas Corporation Commission (KCC) for approval pursuant to K.S.A. 1995 Supp. 66-117(a). WRI also requested KCC approval of the contracts and requested permission to pass contract costs through to its customers. Complicating matters, the KCC shifted a $ 5.9 million Linchpin Development cost item from another rate hearing into this KPP application. The other rate hearing is currently pending in this court as appeal No. 75,730.

On judicial review, KPP asserts that because the KCC failed to make a decision on these contracts and the development cost item within time limits established by KCC regulations and K.S.A. 1995 Supp. 66-117(b), the contracts and other requested relief became "deemed approved" by operation of law. This is the ultimate question for us to decide on the merits of this appeal.

We agree with KPP and reverse.

A brief description of the major participants is as follows:

KPP is a natural gas public utility and the applicant before the KCC.

The KCC is the state regulatory agency with the power and authority to supervise and control intrastate natural gas public utilities doing business in Kansas. See K.S.A. 66-101 et seq.

WRI is a class A natural gas public utility, authorized to deliver natural gas to customers in Kansas, and

was the other signatory to the KPP contracts for which approval was sought. WRI also sought approval of the contracts, but has not appealed the matter to this court.

Williams Natural Gas Company (WNG) is also a natural gas public utility and is a marketplace competitor of KPP.

The Citizens' Utility Ratepayer Board (CURB) is a state agency created to look out for the interests of individuals and small businesses in regulating public utilities.

The Federal Energy Regulatory Commission (FERC) is a federal agency regulating interstate pipelines which are within its exclusive jurisdiction.

The five contracts may be summarized thus: The contracts between KPP and WRI call for the sale and transportation of increased volumes of natural gas for delivery in Johnson, Wyandotte, Franklin, and Miami Counties in Kansas. Two of the three gas purchase contracts require KPP to deliver natural gas to the city gates at Ottawa, Paola, and Osawatomie for a term of 20 years. The third gas purchase contract calls for KPP to transport and sell natural gas to delivery points in Johnson and Wyandotte Counties for a term of 10 years.

The two transportation contracts call for the construction of a 24-mile pipeline spur to connect the Panhandle Eastern Pipeline Company's facilities to those of WRI (the "Metcalf Contract"), and for KPP to provide natural gas to WRI for Johnson and Wyandotte Counties commencing in the year 2009 (the "2009 Contract").

## Jurisdiction

Without detailing the various dates on which various pleadings were filed, we have determined the jurisdictional filings by KPP are timely.

We have exclusive jurisdiction to review any action of the KCC arising from a rate hearing. K.S.A. 1995 Supp. 66-118a(b). In KPP's original filing, it did not request a rate increase, but WRI did. The WRI docket was consolidated with the KPP filing. Additionally, the joinder of the Linchpin Project Development costs into this proceeding made it an action intimately related to a prior rate case. See MAPCO Intrastate Pipeline Co. v. Kansas Corporation Comm'n, 10 Kan. App. 2d 527, 530-31, 704 P.2d 989 (1985); In re Application of Southwestern Bell Tel. Co., 9 Kan. App. 2d 525, 529, 685 P.2d 304, rev. denied 236 Kan. 875 (1984).

The parties seem to agree that this case is closely enough connected to an underlying rate case to give us jurisdiction.

While we have determined we have jurisdiction under K.S.A. 1995 Supp. 66-118a(b), a question still remains whether the KCC order of November 22, 1995, is reviewable.

By applying the relevant considerations of Southwestern Bell, the KCC order is a final agency action entitling KPP to judicial review. The KCC's denial of KPP's arguments that the contracts were "deemed approved" due to the expiration of time is a final decision on this issue. It has a direct effect on KPP and presents a legal question

for our review. Further, ruling on this issue does not disrupt the orderly process of adjudication in the administrative proceeding. The November 22, 1995, KCC order is final agency action subject to review.

In Southwestern Bell, we did not clearly state whether we were considering a final agency decision or a nonfinal agency decision ripe for interlocutory review. Either way, we have jurisdiction to consider KPP's appeal. See K.S.A. 77-607(b), K.S.A. 77-608.

Merits

In orders mailed April 21 and 24, 1995, the KCC suspended the effective dates of the contracts for 180 days of their filing on March 31, 1995; the WRI rate request and the KPP contract dockets were consolidated. After numerous continuances, hearings were finally conducted between August 21, 1995, and September 6, 1995. At the close of the hearings, the KCC closed the record, ordered briefs filed by October 6, 1995, and took the dockets under advisement.

After briefs were filed but before the KCC issued a decision, FERC issued a draft order stating it had jurisdiction over KPP as an interstate pipeline. When FERC asserts jurisdiction, any state regulatory agency loses jurisdiction. As a result, the KCC staff on November 1, 1995, requested a stay pending a final order from FERC. KPP opposed the stay. The KCC issued a stay on November 3, 1995, and on November 22, 1995, issued an order superseding the earlier order, in which it found:

(1) Expiration of the initial 180-day time period set by the KCC did not cause the contracts to be deemed

approved because that order was subject to further KCC orders and KPP did not object to the closing of the record as of October 6, 1995 (beyond the 180-day period);

(2) The KCC order of November 3, 1995, which was within the 240-day limitation of K.S.A. 1995 Supp. 66-117(b) was "probably a sufficient adjudication within the 240-day period of time";

(3) The KCC restarted the 240-day clock called for by K.S.A. 1995 Supp. 66-117(b) because the FERC finding of jurisdiction over KPP was a "substantial alteration of the facts" forming the basis for the KPP request; and

(4) "a continued stay at this juncture serves the public interest especially in light of the unbundling concerns raised by staff should FERC ultimately find it has jurisdiction" over KPP.

On December 8, 1995, several things occurred:

(1) FERC stayed its assertion of jurisdiction over KPP and clarified that KCC orders regarding KPP will remain in effect until FERC made its final rulings in the case.

(2) The KCC denied KPP's request to reconsider its November 3, 1995, order because it was superseded by the KCC order of November 22, 1995.

(3) KPP requested reconsideration of the November 22 KCC order, which was denied on December 28, 1995.

(4) FERC issued an order clarifying a prior order. In this order, FERC stayed its assertion of jurisdiction over KPP until 60 days after an order on the merits of petitions for rehearing. FERC also ruled that, meanwhile, KPP could continue to provide services, collect rates on file with the KCC, and "undertake all other activities authorized by [FERC] and the KCC." (Emphasis added.)

On appeal, our scope of review is set forth in K.S.A. 77-621, which codified principles repeatedly recognized by Kansas courts. See, e.g., Kansas Gas & Elec. Co. v. Kansas Corporation Comm'n, 239 Kan. 483, 497-98, 720 P.2d 1063 (1986); Midwest Gas Users Ass'n v. Kansas Corporation Commission, 3 Kan. App. 2d 376, 380-81, 595 P.2d 735, rev. denied 226 Kan. 792 (1979).

Further, we recognize that the cardinal rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. City of Wichita v. 200 South Broadway, 253 Kan. 434, 436, 855 P.2d 956 (1993).

As indicated earlier, at the close of the technical hearings, the KCC ordered the filing of briefs by October 6, 1995. KPP did not object to the October 6 date, although it was beyond the 180 days mentioned in the original suspension orders which expired on September 27, 1995. Accordingly, we shall concentrate our evaluation of this

appeal on the 240-day limitation contained in K.S.A. 1995 Supp. 66-117(b).

The KCC has never suggested this case is not controlled by K.S.A. 1995 Supp. 66-117(b). Although the statute does not specifically list "gas purchase contracts" or "gas service agreements," clearly these would fall within "practice pertaining to the service or rates of such public utility." See K.S.A. 1995 Supp. 66-117(a).

CURB argues this case is governed by K.S.A. 1995 Supp. 66-1,203, which specifically applies to natural gas public utilities. Pursuant to that statute, every natural gas public utility regulated by the KCC must furnish the KCC with copies of all contracts between natural gas public utilities and all jurisdictional services to be rendered by the utility. WNG also urged this position during oral arguments. This statute applies specifically to natural gas public utilities regulated by the KCC, while K.S.A. 1995 Supp. 66-117(b) merely applies to all public utilities regulated by the KCC.

If a general and a specific statute both apply to a given situation, they should be read together and harmonized when possible. See Kansas Racing Management, Inc. v. Kansas Racing Comm'n, 244 Kan. 343, 353, 770 P.2d 423 (1989). The provisions of these two statutes can be read consistently.

K.S.A. 1995 Supp. 66-117(b) applies when any public utility is requesting a change in its rates or services that will have an impact on its customers. On the other hand, 66-1,203 requires a natural gas public utility to file copies of its rates and contracts, even if no changes are

requested. Although the statutes overlap to some extent, they are not inconsistent and both are applicable.

At last, we reach the core question for our determination: Is KPP's request for relief "deemed approved" by the KCC's failure to issue a final order on the proposed changes within the 240-day period mandated by K.S.A. 1995 Supp. 66-117(b)? We answer in the affirmative.

Preliminarily, at oral argument, the KCC acknowledged that 66-117 is the only statute permitting suspension of an effective date, and CURB candidly, but reluctantly, agreed that 66-117 controls this appeal.

No one contests that the KCC's authority is limited to that conferred by statute. Cities Service Gas Co. v. State Corporation Commission, 197 Kan. 338, 342, 416 P.2d 736 (1966); Kansas-Nebraska Natural Gas Co. v. Kansas Corporation Commission, 4 Kan. App. 2d 674, 675, 610 P.2d 121, rev. denied 228 Kan. 806 (1980). We must determine what now happens when the KCC fails to exercise the power conferred on it by statute.

K.S.A. 1995 Supp. 66-117(b) specifically provides that the KCC shall not delay the effective date of a proposed change in rate or many practice pertaining to service for more than 240 days beyond the date the utility filed its application with the KCC.

The statute further provides that if the KCC has not issued a final order within those 240 days, then "the schedule shall be deemed approved by the commission and the proposed change shall be effective immediately, except

that (1) ... any amendment to an application . . . which increases the amount sought by the public utility . . . or substantially alters the facts used as a basis for requested change . . . shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment, and (2) if hearings are in process before the commission . . . on the last day of such 240-day period, such period shall be extended to the end of such hearings plus 20 days to allow the commission to prepare and issue its final order." K.S.A. 1995 Supp. 66-117(b) (Emphasis added.)

No one contends the hearing was "in process before the commission" on the 240th day. The KCC closed the record and took the matter under advisement prior to expiration of the 240-day period. The question is whether either of the KCC orders of November 3 and 22, 1995, was a "final order" for purposes of 66-117(b). If so, both were entered within the 240-day clock. If not, we must decide whether the KCC acted properly in restarting the 240-day clock. We note that the KCC closed the record in these consolidated dockets at the conclusion of hearings on September 6, 1995. So far as we can determine, the KCC never reopened the record in these consolidated dockets. See K.A.R. 82-1-230(k), (1).

KPP filed its request for approval of the five contracts on March 31, 1995; the 240th day thereafter would be November 29, 1995. On November 2, FERC issued a draft order asserting jurisdiction over KPP, and on November 3 the KCC, sua sponte, determined the dockets should be stayed.

Then on November 22, 1995, the KCC issued another order affirming its order of November 3 and ordering these dockets be stayed until FERC took final, appealable action. This order also purported to restart the 240-day clock ("to the extent, if any, that it applies") as of November 2, 1995. The KCC also stated its November 22 order superseded its November 3 order.

"Final order" has been defined as one which terminates the litigation on the merits and leaves nothing to be done except to enforce the result. Black's Law Dictionary 630 (6th ed. 1990). In an administrative setting, a final order needs to be more than a mere procedural ruling, and "finality" should be interpreted in a pragmatic way. Southwestern Bell Tel. Co. v. Kansas Corporation Commission, 6 Kan. App. 2d 444, 452-53, 629 P.2d 1174, rev. denied 230 Kan. 819 (1981). See Oilfield Fluid Motor Carriers v. Kansas Corporation Comm'n, 234 Kan. 983, 988, 677 P.2d 982 (1984).

In the present case, the KCC orders enter a stay pending a decision by FERC. A "stay" is a suspension of a case. Black's Law Dictionary 1413 (6th ed. 1990). By entering a stay, the KCC did not issue a final order in the proceeding.

Accordingly, this case presents a good example of when a KCC order can be final agency action under 77-607(b)(1), but not a final order under 66-117(b). The KCC's decision rejecting KPP's argument the contracts should be deemed approved (66-117[b]) is a final ruling on that statutory interpretation question. Nothing is unresolved, rendering it a final agency action under 77-607(b)(1). On the other hand, since the KCC has made no ruling regarding

whether KPP's contracts should be approved, it has not entered a final order on the proposed changes under 66-117(b).

As WNG argues, both times the "deemed approved" language appears in the statutes, the phrase refers to a "schedule." "Schedule" is not defined in any statute or any KCC regulation which we have been able to discover, and the parties have not referred us to any such definition. The general definition of "schedule" would cover almost any filing, and pragmatically, we conclude the KPP contracts and other documents appended to its application meet the requirement of a schedule. See K.A.R. 82-1-231; Black's Law Dictionary 1344 (6th ed. 1990).

The KPP contracts would change the practices pertaining to services made available by KPP for WRI's customers. Accordingly, the changes set forth in the contracts fall under the provisions of 66-117(b) requiring KPP to request approval of the changes.

Before leaving this aspect of the case, we need to discuss the legislative history for 66-117. Dramatic changes were made to KCC procedures in 1980 by the enactment of S.B. 881. L. 1980, ch. 200. Minutes of hearings before the House Ways and Means Committee on the bill make clear the legislature was aware it was making significant changes. Minutes to a hearing on April 8, 1980, report that Senator Frank Gaines supported the bill which would permit a utility to automatically get the increase sought when the KCC did not act within a certain time frame. See House Ways and Means Committee, 1980 Session, Minutes of April 8, 1980, p. 1. Throughout the debate on S.B. 881, the KCC was

given only 180 days to decide a case, but the final bill changed this to 240 days.

Most of the testimony before the Ways and Means Committee uses the term "utility rate cases" in discussing the bill, but the term is never defined. Further, "schedule" is not mentioned, except in a proposed draft of the bill. A main proponent of the bill was Southwestern Bell Telephone Company (SWB), which argued time limits were not new and had been adopted by numerous regulatory agencies across the country. Testimony of Bill Ewing (SWB), Attached to Minutes of House Ways & Means Committee, April 8, 1980.

Opposing S.B. 881 was Pete Loux, then chair of the KCC. He argued the states which had adopted time limits had much larger staffs or were responsible for regulating fewer companies. Chairman Loux also presented a staff position paper authored by Brian Moline, then general counsel of the KCC. Moline expressed concern that the language of S.B. 881 was very broad and cautioned that the bill "changes long established public policy of Kansas." KCC Staff Position on S.B. 881, Attached to Minutes of House Ways & Means Committee, April 8, 1980, at 4.

Our review of the legislative history convinces us the purpose of S.B. 881 was to adopt time limits to remedy delays utilities had experienced with the KCC. Nothing in the legislative history suggests the legislature intended to distinguish between "pure" rate cases and hybrid cases that could be considered "arising from a rate hearing" and thus appropriate for exclusive review by this court.

While S.B. 881 does not refer specifically to 66-118a, giving us exclusive jurisdiction over appeals arising from a rate hearing, the bill did amend 66-118g, setting the time limits in which we must decide such cases.

Nothing we have discovered suggests the time limits covered by S.B. 881 were intended to be different for rate cases under 66-117 as opposed to cases arising from a rate hearing pursuant to 66-118g. If a case arises from a rate hearing for purposes of 66-118g, legislative history suggests the time limits of 66-117(b) would also apply.

No one really contests that this case is one arising from a rate hearing. Under the express language of 66-117(b), the schedules/contracts are deemed approved and the proposed changes take effect immediately unless a final order is issued by the KCC within 240 days of KPP's application, or unless one of the exceptions applies.

Here, no final order was issued. As a result, our final question is whether the KCC had the statutory power and authority to restart the 240-day clock under the peculiar facts of this case.

K.S.A. 1995 Supp 66-117(b) provides that after 240 days, the schedule is deemed approved except where an amendment to an application seeks an increase in the amount sought or substantially changes the facts used as a basis for the requested change.

The KCC interprets the statute broadly to include any change of the facts, regardless of whether an amendment to the application has been filed. We are unable to agree with the KCC's interpretation.

Here, none of the parties filed any amendment to the application for proposed change that increased the amount sought by the KPP. Thus, the only way this proceeding could be extended is if the KCC were correct in finding (1) that FERC's preliminary assertion of jurisdiction substantially altered the facts used as a basis for the requested change and (2) that this gave the KCC the option to deem a new application had been filed.

The KCC does not directly address the problem created by the failure of anyone to file an amendment to the application. CURB does not address the need for an amendment either; rather, it argues the KCC was in substantial compliance with the statutory mandate when it restarted the 240-day clock. WNG asserts that 66-117(b) simply does not apply. As previously held, the legislature did not distinguish between types of rate hearings in enacting S.B. 881. The legislature intended the time limits to apply to all hearings requesting a change, including those arising from a rate hearing.

KCC regulations provide for specific procedures to follow when a public utility wants to revise or amend its application or schedules. See K.A.R. 82-1-231(d). Further, Chairman Loux, in his letter to Mike Hayden, then chair of the House Ways and Means Committee, specifically voiced his concern whether an amendment by an applicant would restart the time clock. Loux Memo dated April 8, 1980, attached to House Ways and Means Committee Minutes.

FERC issued its initial order on November 2, 1995. Yet in its order of November 22, the KCC recognized it had continuing jurisdiction over KPP. FERC then stayed its earlier order and clarified that KPP was allowed to undertake

all activities authorized by the KCC. The KCC did not issue its order denying KPP's petition to reconsider until December 28, 1995.

The KCC argues that the FERC order asserting jurisdiction over KPP was a substantial alteration of the facts. An agency's interpretation of a statute should be given deference, but when reviewing a question of law, we may substitute our judgment for that of the agency. See Hickey v. Kansas Corporation Comm'n, 244 Kan. 71, 76, 765 P.2d 1108 (1988).

We note that the KCC was aware as early as June 2, 1995, that FERC was considering asserting jurisdiction over KPP. Since the parties were aware of FERC's interest in KPP for 5 months, we are unable to understand how FERC's order of November 2, 1995, is a substantial alteration of the facts used as a basis for the requested approval of contracts. The facts supporting the proposed changes remained the same although the status of the parties may well have been altered.

Simply put, the punctuation of the statute in light of the legislative history precludes the KCC's interpretation of 66-117(b).

The legislature is presumed to understand the meaning of the words it uses and procedures it establishes. State Bank Commissioner v. Emery, 19 Kan. App. 2d 1063, 1071, 880 P.2d 783 (1994). And when a statute is clear and unambiguous, we must give effect to the legislature's intent as expressed, rather than determine what the law should or should not be. Martindale v. Tenny, 250 Kan. 621, Syl. P 2, 829 P.2d 561 (1992).

Finally, we must decide whether the statutory phrase "substantially alters the facts used as a basis for such requested change of rate" modifies "any amendment" or whether it applies to any change regardless of origin. Grammatically, we have no hesitancy in holding "amendment" is the controlling noun which is the subject of the modifying phrase.

An amendment makes a change or modification. Black's Law Dictionary 81 (6th ed. 1990). It suggests an action by one of the parties to change, correct, or revise. No action was taken by KPP, WRI, or the KCC to change or modify the application which would trigger the provisions of 66-117(b).

Further review of the legislative history concerning the evolution of this provision supports our conclusion that an amendment is required.

The phrase "which amendment" contained in the original 1980 legislation, was deleted in 1988, as part of legislation that broadened application of the administrative procedures act. The legislation changed all time limits from being written out, to numerals (i.e., two hundred forty, to 240). See L. 1988, ch. 356, at 225.

When the phrase under scrutiny is read to include "which amendment" the original intent of the legislature is clearer. The 1988 changes were the result of S.B. 334, which made some substantive changes to the administrative procedures act, but overall appears to be a technical bill to "clean up" the statutes by converting to numerals.

Ordinarily, a change in statutory language is presumed to result from a legislative purpose to change its effect. Schuhs v. Schuhs, 20 Kan. App. 2d 98, 99, 883 P.2d 1225 (1994). But this presumption is of little force if an amendment is adopted as part of a general, technical revision to a statute. Board of Education U.S.D. 512 v. Vic Regnier Builders, Inc., 231 Kan. 731, 736, 648 P.2d 1143 (1982).

We do not view the deletion of the phrase "which amendment" by the legislature in 1988 as a substantive change intended to modify the meaning of 66-117(b). Rather, the change was merely part of a larger bill seeking to bring consistency to statutes under the administrative procedures act.

At the time the original provisions imposing time limits on the KCC were adopted, the House Ways and Means Committee rejected without discussion a suggestion that would have given the KCC more flexibility in deciding cases under the new time limits. House Ways and Means Committee Minutes, May 2, 1980, p. 2.

Thus, the legislature was intent on forcing the KCC to act within prescribed time limits; if it does not, the proposed changes take effect. In 1980, the legislature recognized the increased burden the time limits would place on KCC staff. Senator Frank Gaines assured members of the House that adequate funds would be provided for the KCC "to adequately and efficiently carry out the provisions of this act" and further "gave his personal assurance that funds would be provided." House Ways and Means Committee Meeting, May 2, 1980, p. 1.

CURB asks us not to abandon or ignore the "thousands" of hours of staff work and the "hundreds of thousands of dollars" of legal and technical analysis expended on the five contracts submitted for approval. But legislative history makes clear that was precisely an anticipated result should the KCC fail to make a final decision within the time limits provided by K.S.A. 1995 Supp. 66-117(b).

The contracts and related requests contained in KPP's consolidated KCC dockets must be deemed approved by operation of law.

Reversed.

# APPENDIX C

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

| | | |
|---|---|---|
| In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,506-U |
| In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recovery from its customers. | ) | Docket No. 192,391-U |
| In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,507-U |
| | ) | **ENTERED** |
| | ) | **NOV 3 1995** |

ORDER

On October 25, 1995, the Federal Energy Regulatory Commission (FERC) decided during their administrative

meeting that KansOk Partnership (KansOk), Kansas Pipeline Partnership (Kansas Pipeline) and Riverside Pipeline Company, L.P. (Riverside) constituted an interstate pipeline subject to FERC's jurisdiction. In response to FERC's action and draft order, the Kansas Corporation Commission Staff (Staff) filed a Motion for Stay of Proceedings on November, 1995.

Pursuant to K.S.A. 77-526(g), the Kansas Corporation Commission (Commission) must issue an order within 30 (thirty) days after the conclusion of the hearing or submission of findings. In this case, parties submitted their findings of fact and conclusions of law on October 6, 1995. Accordingly, the Commission has through November 6, 1995, in which to issue an order or extend the period of time in which to issue a final order for good cause shown.

The Commission notes that on November 2, 1995, FERC issued an initial order and Kansas Pipeline et al. was ordered to file an application for certificate authorization. The Commission, on its own motion, has determined that a stay of the above referenced dockets is appropriate until all parties have had an opportunity to respond to the Motion for Stay of Proceedings filed by Staff and until such time as the period for rehearing before FERC has passed and final appealable action has been taken.

IT IS, THEREFORE, BY THE COMMISSION ORDERED:

1. The above-referenced dockets are stayed pending further order of this Commission.

2. All parties may file a response to Staff's Motion for Stay of Proceedings on or before November 14, 1995.

A party may file a petition for reconsideration of this order within fifteen (15) days from the date of this order. If service is by mail, three (3) additional days may be added to the fifteen (15) day time limit to petition for reconsideration.

The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: November 3, 1995

**[ORDER MAILED ]**
**[NOV 3 1995 ]**
**[JUDITH MCCONNELL ]**
**[EXECUTIVE DIRECTOR ]**

/s/_____
Judith McConnell
Executive Director

# APPENDIX D

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

| | | |
|---|---|---|
| In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,506-U |
| In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recovery from its customers. | ) | Docket No. 192,391-U |
| In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,507-U |
| | ) | **ENTERED** |
| | ) | **NOV 22 1995** |

## ORDER

This matter is before the Kansas Corporation Commission (Commission) on the Motion of Commission Staff (Staff) for Stay of Proceedings. On November 1, 1995, Staff requested a stay of proceedings "pending a final order in Federal Energy Regulatory Commission (FERC) Docket Nos. RP95-212-000 and RP95-395-000." (Staff's motion, p. 1). Staff based its request for stay on FERC's ruling on October 25, 1995, and Draft Order which provides that "the natural gas transmission systems of KansOk Partnership, KPP and Riverside Pipeline Company, L.P. (collectively referred to as Kansas Pipeline) constitute an interstate natural gas pipeline system subject to FERC jurisdiction under the Natural Gas Act." (Staff's motion, p.2). Staff argued that the Commission, after FERC's ruling and issuance of a Section 7 Certificate to Kansas Pipeline, would not have jurisdiction. Staff believes further action would constitute "a wasteful and inefficient use of the Commission's resources and would be unnecessary under the present circumstances." (Staff's motion, p.3).

On November 2, 1995, FERC issued an official order memorializing the action taken on October 25, 1995. On November 3, 1995, the Commission stayed the above-captioned cases pending an opportunity for all parties to respond to Staff's Motion for Stay of Proceedings and until such time as the period for rehearing has passed before FERC and final appealable action has been taken.

For purposes of Staff's motion and the responses filed thereto, Staff appeared by Larry Cowger; Kansas Pipeline Partnership (Kansas Pipeline) appeared by James P.

Zakoura and Richard W. Hird; Western Resources, Inc. (Western Resources) appeared by J. Michael Peters; Williams Natural Gas Company (WNG) appeared by John C. Frieden and Kevin M. Fowler; and the Cities of Ottawa and Paola, Kansas, appeared by Robert L. Bezek, Jr.

Kansas Pipeline argues the process outlined by FERC in its November 2, 1995 Order -- "an application for certificate, approval of terms and conditions of service, approval of rates, and transitioning existing operations to be in compliance with FERC Order No. 636 -- could extend well over a year, and perhaps more." (Kansas Pipeline's response, p.3). Kansas Pipeline is seeking a stay of FERC's November 2, 1995 Order and also intends to seek rehearing of that Order.

Kansas Pipeline argues the Commission is without power to stay this action. Specifically, Kansas Pipeline references the Commission's April 21, 1995 Orders in Docket Nos. 192,506-U and 192,507-U which granted a 180-day suspension period from the date the applications were filed on March 31, 1995. Kansas Pipeline argues the suspension period expired on September 27, 1995. Since there were no further suspensions issued, Kansas Pipeline contends the contracts in Docket Nos. 192,506-U and 192,507-U became effective on September 27, 1995. (Kansas Pipeline's response p. 5).

Moreover, Kansas Pipeline contends even if FERC arguably assumed jurisdiction on November 2, 1995, the suspension period expired prior to FERC's order. In the alternative, Kansas Pipeline argues that the Commission must issue an order within 240 days, no later than November 29,

1995, or the contracts are deemed approved. K.S.A. 66-117. (Kansas Pipeline's response, p.6)

Kansas Pipeline believes Staff's request for a stay is "unusual, extraordinary and inappropriate." (Kansas Pipeline's response, p.6). Only WNG, according to Kansas Pipeline, will benefit from a stay and "the contracts may become null and void simply by the passage of time...." (Kansas Pipeline's response, p.7).

Kansas Pipeline maintains the Commission continues to have jurisdiction. If the Commission were not to regulate Kansas Pipeline, prior to the issuance of a FERC certificate, Kansas Pipeline would be in "jurisdictional limbo." (Kansas Pipeline's response, p.8). Further, Kansas Pipeline intends to pursue all available avenues of appeal regarding FERC's November 2, 1995 Order. Staff's motion, according to Kansas Pipeline, would place it in "regulatory limbo for an indeterminate amount of time" and would constitute an unconstitutional taking without compensation if it could not charge "fair, just and reasonable rates." (Kansas Pipeline's response, p.10). Kansas Pipeline believes a Commission decision would be beneficial to the FERC and approval of the applications would benefit consumers. (Response, pp.10-12).

Western Resources' response calls attention to the "commercial transactions for which time is important." (Western Resources' response, p.3). Western Resources also believes the Commission "must reconcile its intended stay of these proceedings in light of its April 20, 1995 Suspension Order...." (Western Resources' response, p.3). And finally, Western Resources requests the Commission to rule "expeditiously." (Western Resources' response, p.3).

WNG seeks reconsideration of the Commission's June 22, 1995 Order [denial of WNG's motion for denial of stay] and July 26, 1995 Order [denial of WNG's motion to dismiss for lack of subject matter jurisdiction] based on the "materially changed circumstances" and requests that all pending applications be dismissed without prejudice until such time as FERC determines it "does not have jurisdiction over Kansas Pipeline Partnership under the Natural Gas Act." (WNG's response, p.2) WNG concurs with Staff's basis for a stay, but believes dismissal of the pending applications on jurisdictional grounds to be more appropriate. (WNG's response, p.2)

WNG has argued that these proceedings are subject to K.S.A. 66-117 and K.A.R. 82-1-231 but contends "it is unclear whether the 240-day period prescribed in K.S.A. 66-117(b) is applicable." WNG believes the Commission's stay granted on November 3, 1995, "to determine whether the Commission has any continuing jurisdiction over the contracts and/or whether the decision by FERC is effectively an amendment or modification to the applications filed by joint applicants is likely a sufficient adjudication or otherwise fulfills the requirements under K.S.A. 66-117." (WNG's response, pp.3-4). Arguably, the contracts may be "deemed approved" pursuant to K.S.A. 66-117(b), notwithstanding the stay. WNG previously sought a stay from the Commission, pending final outcome at FERC, and also sought dismissal of these proceedings for lack of subject matter jurisdiction. WNG believes FERC's action on October 25, 1995, constitutes a material change in circumstances to warrant reconsideration of WNG's previous motion to dismiss.

Dismissing the action without prejudice would avoid any "possibility that the proposed contracts may be 'deemed

approved' without Commission action after November 26, 1995." (WNG's response, p.5). While WNG "endorses... Staff's rationale for a stay" WNG seeks dismissal of the contracts for lack of subject matter jurisdiction. (WNG's response, p.5)

The Cities of Ottawa and Paola, Kansas (Ottawa and Paola) believe "no valid reason exists for the Commission to avoid deciding the above, to deny the approval of the five gas and transportation contracts filed by Kansas Pipeline and deny the pass-through of costs, resulting from the contracts to Western Resources." (Ottawa and Paola's response, pp.1-2). Ottawa and Paola stated that the two main issues, whether to approve the five gas contracts and whether to approve the pass-through, are briefed and ready for decision. In the event FERC removes jurisdiction from the Commission, Ottawa and Paola contend the Commission would still have jurisdiction to consider the pass-through issue. (Ottawa and Paola's response, p. 2). Ottawa and Paola believe "[t]he ability to acquire right of way, utility easements and the utility franchise itself is clouded by the lack of a decision regarding the gas and transportation contracts." Moreover, "regarding the approval and pass-through of these contract costs, there will always be a question as to whether the franchise can be condemned with or without the gas contracts." (Ottawa and Paola's response, pp. 2-3). Ottawa and Paola believe they will suffer harm if no decision is made. (Ottawa and Paola's response, p. 3).

In the event the Commission believes the FERC decision has the impact of removing jurisdiction, Ottawa and Paola recommend the Commission dismiss this proceeding without prejudice prior to the expiration of 240 days to avoid approval of these contracts and impose certain conditions.

Those conditions would include the requirement that the refiled action be submitted on the record that exists and that a decision be rendered within a specified period of time, i.e., 60 (sixty) days. (Ottawa and Paola's response, pp. 3-4). And finally, if Kansas Pipeline and Western Resources make any modifications to these contracts, then the prior contracts should be deemed denied and the new contracts resubmitted with notice to all parties and "without requiring agreement to confidentiality contracts." (Ottawa and Paola's response, p. 4).

Staff filed a reply to the responses to Staff's motion for stay. Staff set forth a brief procedural history of these consolidated dockets. On April 20, 1995, the Commission suspended for 180 days from the date of the applications, approval of these agreements "subject to further order or orders of the Commission." (Docket Nos. 192,506-U and 192,507-U). On April 27, 1995, the commission consolidated the above three dockets upon Western Resource's motion. The Commission set a procedural schedule by order dated May 10, 1995. Two subsequent orders modified the procedural schedule and ultimately an evidentiary hearing commenced on August 21, 1995. (Staff's reply, pp. 2-3). The evidentiary hearing ended September 6, 1995, and parties were ordered to file briefs and/or findings of fact and conclusions of law on or before October 6, 1995. Staff interprets these orders as superseding the prior suspension orders. While staff believes "the Commission's orders modifying the procedural order obviously extended the proceedings past the originally scheduled 180 days, it would have apparently been helpful to some parties had the Commission explicitly spelled out in an order the fact that by extending its procedural orders past September 27, 1995, the original suspension order had been

modified." (Staff's reply, p. 3). Accordingly, Staff now requests the Commission to make this explicit finding at this time.

Staff contends the only arguable "operation of law" date to apply to these applications is contained in K.S.A. 66-117(b). The statute first "provides that if a utility files 'a schedule showing the changes to be made,' such proposed schedule shall be deemed approved if not suspended by the Commission within thirty (30) days of its filing." (Staff's reply, pp. 3-4). Moreover, the statute requires that the effective date of the changes proposed may not be delayed beyond 240 days from the date of filing. Staff references other statutory authority:

> [T]he specific statute requiring the filing of contracts by natural gas utilities, K.S.A. 66-1,203, makes no mention of the 240-day requirement, nor does the statute authorizing a hearing on gas rates, K.S.A. 66-1,204." (Staff's reply, p. 4). In fact, case law discussing the Commission's duty to investigate the reasonableness of contracts filed by a public utility have indicated that such duty flows from general grant of power and authority contained in K.S.A. 66-101 (c.f. K.S.A. 66-1,201) which likewise does not reference any 240-day requirement. *Central Kansas Power Co. v. State Corp. Commission*, 316 P.2d 277, 181 Kan. 817 (1957).

(Staff's reply, p. 4). Staff stated that the expiration of the 240-day requirement, for argument purposes, would require a decision on the contracts by November 27, 1995.

Staff highlights an exception to the 240-day rule and argues its applicability here. K.S.A. 66-117(b)(1) provides:

> (1) for purposes of the foregoing provisions regarding the period of time within which the commission shall act on an application, any amendment to an application for a proposed change in any rate, which increases the amount sought by the public utility or common carrier or substantially alters the facts used as a basis for such requested change of rate, shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment.

(Staff's reply, pp. 4-5 citing K.S.A. 66-117(b)(1)). Staff believes the Commission should exercise its discretion under this provision. Staff concurs with WNG's interpretation that the "Commission order to stay these proceedings to determine whether it has any continuing jurisdiction over the contracts and/or whether the decision by the Federal Energy Regulatory Commission (FERC) is effectively an amendment or modification to the application filed by joint applicants, is likely a sufficient adjudication or otherwise fulfills the requirements under K.S.A. 66-117." (Staff's reply, p. 5). Staff also interprets FERC's decision which subjects Kansas Pipeline's pipe gas transmission systems to federal jurisdiction "is a matter which 'substantially alters the facts used as a basis for such requested change . . .' K.S.A. 66-

117(b)" would enable the Commission to exercise its discretion to restart the 240-day period. (Staff's reply, p. 5).

There appears to be a consensus among the parties, according to Staff, that the Commission has jurisdiction until FERC grants Kansas Pipeline the Section 7 Natural Gas Act authority. Even though the Commission continues to have jurisdiction for at least a short period of time "does not mean . . . the Commission should exercise that authority and approve expansion of the KPP interstate system through the proposed construction projects envisioned in the current applications." (Staff's reply, pp. 5-6). Staff believes approving additional sales volumes from Kansas Pipeline to Western Resources would be "unwise" since FERC Order 636 would require Kansas Pipeline "to cease its merchant function." (Staff's reply, p. 6).

Staff has outlined three options available to the Commission at this time:

> First, dissolve the stay and determine this matter on the merits, issuing an order no later than November 27, 1995, (in which case Staff would refer the Commission to its Post-Hearing Brief and urge that the applications be denied for lack of merit).;
>
> Second, issue an order restarting the 240-day period due to the November 2, 1995 FERC Order finding KPP

> (Kansas Pipeline) to be subject to federal NGA jurisdiction and maintain its stay of these proceedings until FERC resolves any petition for rehearing filed by KPP; or
>
> Finally, to dissolve the stay and to reconsider its Orders of June 22, 1995, and June 26, 1995, in light of the materially changed circumstances, and dismiss all pending applications without prejudice to further consideration of the merits in the unlikely event FERC reverses its Order and determines that it does not have jurisdiction over KPP pursuant to the NGA. Such an order would also have to be issued no later than November 27, 1995.

(Staff's reply, p. 6). Staff recommends, out of the options presented, that the Commission reaffirm its order staying this action pending a final order from FERC on reconsideration and that the Commission restart the 240-day period based on the fact that FERC's order substantially altered the basis for the requested change. Staff believes the legislature contemplated relief from the 240-day period for circumstances such as these and neither Kansas Pipeline nor

Western Resources should use this provision to pressure the Commission into a decision. (Staff's reply, p.8).

Kansas Pipeline takes issue with Staff's suggestion that the 180-day suspension orders were extended by "implication." Kansas Pipeline argues that "[p]rior to September 27, 1995, the Commission could arguably have entered an order extending the suspension period up to the full 240 days; however, neither Staff, nor any other party, requested such an extension and the Commission did not do so on its own motion or of its own accord." (Kansas Pipeline's reply, pp.3-4). Kansas Pipeline does not believe the deadline for submission of briefs after the expiration of the 180-day suspension order to constitute a written statement pursuant to K.S.A. 66-117. Kansas Pipeline also does not believe an "order by implication" satisfies the requirement that orders must be in writing. K.A.R. 2-1-232. (Kansas Pipeline's reply, p.5). Kansas Pipeline did not suggest that the Commission lost jurisdiction after expiration of the suspension orders. Kansas Pipeline also disputes Staff's reference to K.S.A. 66-1,203 and 66-1,204 for the proposition that the 240-day period is inapplicable. Kansas Pipeline believes only K.S.A. 66-117(b) governs time limitations in Docket Nos. 192,506-U and 192,507-U. (Kansas Pipeline's reply, p.6)

Kansas Pipeline disagrees with Staff's recommendation that FERC's November 2, 1995 Order altered the facts used as the basis for the change in rates. Kansas Pipeline does not believe the Commission's order staying this proceeding constitutes an adjudication on the merits or sufficient grounds to restart the 240-day time period. Kansas Pipeline believes the three options presented

by staff are erroneous and ignore the statutory deadlines. (Kansas Pipeline's reply, pp.8-9).

WNG has filed a reply to Kansas Pipeline's response to Staff's Motion for Stay. WNG suggests the following alternatives for Commission action:

> (i) entering an order of dismissal for lack of subject matter jurisdiction (without prejudice to further consideration on the merits in the event of a final determination that FERC lacks jurisdiction over its operations) no later than November 27, 1995;
>
> (ii) dismissing KPP's applications unless each is amended on or before November 27, 1995, to address the materially changed factual circumstances presented by FERC's November 2, 1995 Order; or
>
> (iii) denying KPP's applications on the merits for the factual and legal reasons set forth in the post-hearing submissions of the Staff and the Intervenors.

(WNG's reply, p.2)

WNG recognizes the Commission's problem as to whether it has jurisdiction after FERC's November 2, 1995 Order in Docket Nos. RP95-212-000 and RP95-395-000. WNG is concerned that Commission inaction would result in

the "unpalatable possibility that the proposed contracts may become effective by operation of law after November 27, 1995.". (WNG's reply, p.2)

WNG also outlines the procedural history of these dockets. WNG references the fact that Kansas Pipeline never argued the contracts were effective by operation of law on September 27, 1995, when the hearing was extended to accommodate Dr. Stalon's testimony, one of Kansas Pipeline's witnesses. (WNG's reply, p.7). Nor did Kansas Pipeline, according to WNG, make this representation when the Commission announced the briefing schedule on September 6, 1995.

WNG believes that "[i]f the time limits of K.S.A. 66-117(b) are applicable to these proceedings, this statute further provides that 'any amendment to an application for a proposed change' which 'substantially alters the facts used as a basis for such requested change' may, in the Commission's discretion, 'be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment.'" (WNG's reply, p.8). Although Kansas Pipeline has not filed an amendment, WNG interprets the FERC's November 2, 1995 Order as changing the "factual bases for these applications." (WNG's reply, p.8). For instance, WNG referenced the fact that the proposed contracts bundle both sales and transportation while as interstate pipeline, those services would need to be unbundled. (WNG's reply, p.8).

WNG contends Kansas Pipeline's position before the Kansas Corporation Commission, maintaining that the Commission has ongoing jurisdiction, is inconsistent with its position before FERC. Kansas Pipeline has sought a stay

from FERC's November 2, 1995 Order on the grounds that FERC is depriving the Commission of its "regulatory jurisdiction." (WNG's reply, pp.8-9)

WNG also cites page 18 of FERC's November 2, 1995 Order "which sought . . . to prohibit KPP from 'constructing new pipelines or any expansions or extensions of existing pipelines without [Federal Energy Regulatory] Commission approval to the extent such construction requires Commission approval. See FERC Docket No. RP95-395-000 (Complaint of Williams Natural Gas Company, dated July 21, 1995, p. 63 at ¶ (e))." (WNG's reply, p.10). Moreover, before any construction for facilities or extension are put in force, the interstate pipeline must have a FERC certificate. (WNG's reply, p.10). WNG cites authority which support the proposition that a state utilities Commission cannot exercise concurrent jurisdiction with FERC. 15 USC § 717f(c)(1)(A); *Cascade Natural Gas Corp. v. F.E.R..C.*, 955 F.2d 1412 (10th Cir. 1992); *National Fuel Gas Supply Corp. v. Public Service Comm'n of State of New York,* 894 F.2d 571 (2d Cir. 1990).

WNG suggests that Kansas Pipeline could seek an interim certificate from FERC to avoid any detrimental impact on its proposals. (WNG's reply, p.11). Moreover, WNG states that "none of the proposed contracts involve sales or transportation of natural gas during the 1995-96 winter heating season." In summary, WNG seeks dismissal "of the pending applications for lack of subject matter jurisdiction (without prejudice to further consideration on the merits in the event of a final determination that FERC lacks jurisdiction over its operations) no later than November 27, 1995, or to immediately dismiss KPP's pending applications unless it amends each no later than November 27, 1995, to

address the materially changed factual circumstances presented by FERC's November 2, 1995 Order and, in such event, to restart the 240-day period for a final order hearing if deemed necessary." (WNG's reply, p. 12). In the alternative, WNG seeks to have the Commission deny Kansas Pipeline's applications or "issue an order disapproving any new services and related pipeline construction on or before November 27, 1995." (WNG's reply, p. 12).

Findings and Conclusions

The Commission does not give any credence to the argument raised by Kansas Pipeline that the subject contracts (Docket Nos. 192,506-U and 192,507-U) became effective by operation of law on September 27, 1995, the expiration of the 180-day suspension orders. The suspension orders entered April 20, 1995, clearly provided they were subject to any further order(s) of the Commission. Subsequent procedural orders setting this matter for hearing superseded the earlier suspension orders and the Commission so finds. Moreover, on September 6, 1995, the Commission specifically directed the parties to file briefs and/or findings of fact and conclusions of law by October 6, 1995. No objection was raised by Kansas Pipeline or any other party to the October 6, 1995 date for purposes of closing the record. Had the parties felt the contracts became effective September 27, 1995, there would have been no need for briefs, etc. The Commission deems Kansas Pipeline's failure to timely object to the Commission's September 6, 1995 bench ruling as a waiver of their objection.

The Commission concurs with WNG's contention that the Commission's Order of November 3, 1995, is probably

a sufficient adjudication within the 240-day period of time. The Commission's Order granting the stay was based on FERC's official Order of November 2, 1995, which memorialized FERC's decision from its October 25, 1995 agenda.

The Commission adopts Staff's recommendation and, to the extent (if any) K.S.A. 66-117(b) applies, shall restart the 240-day clock. K.S.A. 66-117(b) specifically grants the Commission discretion to restart the 240-day time period when a substantial alteration of the facts occurs which formed the basis for Kansas Pipeline's requested change, i.e., FERC's finding that Kansas Pipeline is an interstate pipeline subject to the NGA. The Commission shall restart the 240-day clock as of November 2, 1995, the date of FERC's order finding Kansas Pipeline to be an interstate pipeline.

The Commission recognizes the concerns raised by Ottawa and Paola as to the need to have a decision in order to determine outstanding franchise and easement questions. However, the Commission believes that a continued stay at this juncture serves the public interest especially in light of the unbundling concerns raised by Staff should FERC ultimately find it has jurisdiction over Kansas Pipeline. The Commission believes the benefits to a short stay pending FERC's issuance of a final appealable order outweighs any potential harm caused by the delay. The Commission shall continue to exercise jurisdiction over Kansas Pipeline until such time as FERC grants Kansas Pipeline certificates or otherwise resolves the pending dockets (Docket Nos. RP95-212-000 and RP95-395-000). The Commission does not, however, believe this requires the Commission to decide whether to approve contracts, which may not be appropriate

under FERC Order 636, as a prudent exercise of the Commission's discretion at this time.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

1. The Commission's procedural orders setting these consolidated dockets for hearing superseded any prior suspension orders.

2. The Commission affirms its November 3, 1995 Order and stays consideration of these dockets until FERC has taken final appealable action.

3. The Commission shall restart the 240-day time period (to the extent, if any, that it applies) as of November 2, 1995.

A party may file a petition for reconsideration of this order within fifteen (15) days from the date of this order. If service is by mail, three (3) additional days may be added to the fifteen (15) day time limit to petition for reconsideration.

The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: November 22, 1995.

**[ORDER MAILED ]**
**[NOV 22 1995 ]**
**[JUDITH MCCONNELL ]**
**[EXECUTIVE DIRECTOR ]**

/s/
Judith McConnell
Executive Director

# APPENDIX E

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

| | | |
|---|---|---|
| In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,506-U |
| In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recover from its customers.) | ) | Docket No. 192,391-U |
| In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,507-U |
| | ) | **ENTERED** |
| | ) | **DEC 8 1995** |

ORDER

This matter is before the State Corporation Commission of the State of Kansas (Commission) on Kansas Pipeline Partnership's (KPP's) Petition for Reconsideration

or, in the Alternative, Petition for Hearing. KPP appeared by James P. Zakoura, Richard W. Hird and Fred J. Logan, Jr. KPP seeks reconsideration of the Commission's November 3, 1995 Order which preliminarily stayed the above-captioned actions due to FERC's Order issued on November 2, 1995, and in order to give parties an opportunity to respond to Staff's Motion for Stay. After the parties were given an opportunity to file responses to Staff's Motion for Stay, the Commission issued a subsequent order on November 22, 1995, which supersedes the Commission's November 3 Order.

Accordingly, KPP's petition for reconsideration and request for a hearing on the November 3, 1995 Order is denied since the November 22, 1995 Order supersedes the November 3, 1995 Order and continues the stay of these proceedings.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

Kansas Pipeline Partnership's Petition for Reconsideration or, in the Alternative, Petition for Hearing is denied.

Kansas Pipeline Partnership has exhausted its administrative remedies as to the November 3, 1995 Order.

The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: December 8, 1995

**[ORDER MAILED ]**
**[DEC 8 1995 ]**
**[JUDITH MCCONNELL ]**
**[EXECUTIVE DIRECTOR ]**

/s/
Judith McConnell
Executive Director

# APPENDIX F

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Susan M. Seltsam, Chair
F. S. Jack Alexander
Timothy E. McKee

| | | |
|---|---|---|
| In the Matter of the Filing of Kansas Pipeline Partnership for approval and to make effective certain firm gas purchase contracts between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,506-U |
| In the Matter of the Application of Western Resources for an order approving certain contracts with Kansas Pipeline Partnership, and authorizing inclusion of costs related to such contract in Western Resources' purchased gas adjustment clause for recover from its customers.) | ) | Docket No. 192,391-U |
| In the Matter of the Filing of Kansas Pipeline for approval and to make effective certain gas transportation service agreements between Kansas Pipeline Partnership and Western Resources, Inc. | ) | Docket No. 192,507-U |
| | ) | **ENTERED** |
| | ) | **DEC 28 1995** |

ORDER

This matter is before the Kansas Corporation Commission (KCC) on Kansas Pipeline Partnership's (KPP) "Petition for Reconsideration of November 22, 1995 Order."

KPP appeared by James P. Zakoura, Richard W. Hird and Fred J. Logan, Jr. The KCC notes that it has filed a petition for rehearing before the Federal Energy Regulatory Commission (FERC) in Docket Nos. RP95-212-000 and RP95-395-000 which is still pending. The resolution of these FERC dockets will determine the jurisdictional issues regarding KPP. The KCC recognizes that Western Resources, Inc., one of the Joint Applicants, will remain Kansas jurisdictional notwithstanding FERC's ruling. Western Resources, Inc. has not sought reconsideration of the November 22, 1995 Order or responded to KPP's petition for reconsideration. Accordingly, the Commission finds no reason to alter its prior decision at this time. The Order of November 22, 1995 is affirmed for the reasons stated in that Order and the stay of the above-captioned dockets will remain in place subject to further order or orders of the KCC.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT: KPP's "Petition for Reconsideration of November 22, 1995 Order" is denied. KPP has exhausted its administrative remedies as to the November 22, 1995 Order.

The KCC retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Seltsam, Chr.; Alexander, Com.; McKee, Com.

Dated: December 28, 1995

**[ORDER MAILED ]**
**[DEC 28 1995 ]**
**[JUDITH MCCONNELL ]**
**[EXECUTIVE DIRECTOR ]**

/s/
Judith McConnell
Executive Director

# APPENDIX G

## AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of

the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

# APPENDIX H

**66-117. Change of rates or schedules; procedure; effective date; higher rates of return in certain cases; hearing; property tax surcharge authorized.** (a) Unless the state corporation commission otherwise orders, no common carrier or public utility over which the commission has control shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of such public utility or common carrier except by filing the same with the commission at least 30 days prior to the proposed effective date. The commission, for good cause, may allow such changed rate, joint rate, toll, charge, charge or classification or schedule of charges, or rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier to become effective on less than 30 days' notice. If the commission allows a change to become effective on less than 30 days' notice, the effective date of the allowed change shall be the date established in the commission order approving such change, or the date of the order if no effective date is otherwise established. Any such proposed change shall be shown by filing with the state corporation commission a schedule showing the changes, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof.

(b) Whenever any common carrier or public utility governed by the provisions of this act files with the state corporation commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, the commission either upon complaint or upon its own motion, may give notice and hold a hearing upon such proposed changes, Pending such hearing, the commission may suspend the operation of such schedule and defer the effective date of such change in rate, joint rate,

toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier by delivering to such public utility or common carrier a statement in writing of its reasons for such suspension. The commission shall not delay the effective date of the proposed change in rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, more than 240 days beyond the date the public utility or common carrier filed its application requesting the proposed change. If the commission does not suspend the proposed schedule within 30 days of the date the same is filed by the public utility or common carrier, such proposed schedule shall be deemed approved by the commission and shall take effect on the proposed effective date. If the commission has not issued a final order on the proposed change in any rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, within 240 days after the carrier or utility files its application requesting the proposed change, then the schedule shall be deemed approved by the commission and the proposed change shall be effective immediately, except that (1) for purposes of the foregoing provisions regarding the period of time within which the commission shall act on an application, any amendment to an application for a proposed change in any rate, which increases the amount sought by the public utility or common carrier or substantially alters the facts used as a basis for such requested change of rate, shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment, and (2) if hearings are in process before

the commission on a proposed change requested by the public utility or common carrier on the last day of such 240-day period, such period shall be extended to the end of such hearings plus 20 days to allow the commission to prepare and issue its final order.

(c) Except as provided in subsection (b), no change shall be made in any rate, toll, charge, classification or schedule of charges or joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission. Within 30 days after such changes have been authorized by the state corporation commission or become effective as provided in subsection (b), copies of all tariffs, schedules and classifications, and all rules and regulations, except those determined to be confidential under rules and regulations adopted by the commission, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

(d) Upon a showing by a public utility before the state corporation commission at a public hearing and a finding by the commission that such utility has invested in projects or systems that can be reasonably expected (1) to produce energy from a renewable resource other than nuclear for the use of its customers, (2) to cause the conservation of energy used by its customers, or (3) to bring about the more efficient use of energy by its customers, the commission may allow a return on such investment equal to an increment of from 1/2% to 2% plus an amount equal to the rate of return fixed for the utility's other investment in property found by the commission to be used or required to be used in its services to the public. The commission may also allow such

higher rate of return on investments by a public utility in experimental projects, such as load management devices, which it determines after public hearing to be reasonable designed to cause more efficient utilization of energy and in energy conservation programs or measures which it determines after public hearing provides a reduction in energy usage by its customers in a cost-effective manner.

(e) Whenever, after the effective date of this act, an electric public utility, a natural gas public utility or a combination thereof, files tariffs reflecting a surcharge on the utility's bills for utility service designed to collect the annual increase in expense charged on its books and records for ad valorem taxes, such utility shall report annually to the state corporation commission the changes in expense charged ad valorem taxes. For purposes of this section, such amounts charged to expense on the books and records of the utility may be estimated once the total property tax payment is known. If found necessary by the commission or the utility, the utility shall file tariffs which reflect the change as a revision to the surcharge. Upon a showing that the surcharge is applied to bills in a reasonable manner and is calculated to substantially collect the increase in ad valorem tax expense charged on the books and records of the utility, or reduce any existing surcharge based upon a decrease in ad valorem tax expense incurred on the books and records of the utility, the commission shall approve such tariffs within 30 days of the filing. Any over or under collection of the actual ad valorem tax increase charged to expense on the books of the utility shall be either credited or collected through the surcharge in subsequent periods. The establishment of a surcharge under this section shall not be deemed to be a rate increase for purposes of this act. The net effect of any surcharges established under this section

shall be included by the commission in the establishment of base rates in any subsequent rate case filed by the utility.

(f) Except as to the time limits prescribed in subsection (b), proceedings under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

# APPENDIX I

**66-1223. Consumer counsel, powers.** The consumer counsel may do the following:

(a) Represent residential and small commercial ratepayers before the state corporation commission;

(b) function as an official intervenor in cases filed with the state corporation commission, including rate increase requests;

(c) initiate actions before the state corporation commission;

(d) represent residential and commercial ratepayers who file formal utility complaints with the state corporation commission;

(e) intervene in formal complaint cases which would affect ratepayers; and

(f) make application for a rehearing or seek judicial review of any order or decision of the state corporation commission.

# APPENDIX J

No. 96-75918-A

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IN THE SUPREME COURT
OF THE STATE OF KANSAS

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KANSAS PIPELINE PARTNERSHIP

Petitioner,

v.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,

Respondent.

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# CITIZENS' UTILITY RATEPAYER BOARD'S PETITION TO SUPREME COURT FOR REVIEW OF COURT OF APPEALS' DECISION

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Attorney for Intervenor
Citizens' Utility Ratepayer Board

## I. PRAYER FOR REVIEW

COMES NOW the Intervenor, Citizens' Utility Ratepayer Board ("CURB"), and requests the Supreme Court to review the Court of Appeals' decision in this matter. CURB is aggrieved by the decision which deprives ratepayers of the State of Kansas the opportunity for a hearing on the merits to determine the propriety of five gas purchase and transportation contracts entered into between Kansas Pipeline Partnership ("KPP") and Western Resources, Inc. ("WRI"). As hereinafter noted, the decision of the Court of Appeals extinguishes ratepayers' fundamental due process rights to a hearing on the merits of the subject agreements. The Court's ruling that the contracts are deemed approved by operation of law without consideration of the merits of the contracts is contrary to fundamental Fourteenth Amendment due process principles. CURB respectfully requests that the Supreme Court review the decision of the Court of Appeals, reverse that decision, and remand the cause to the State Corporation Commission ("Commission") for appropriate action.

## II. DATE OF THE DECISION OF THE COURT OF APPEALS

The date of the Court of Appeals' decision is May 17, 1996. A complete copy of the Court of Appeals' decision is appended hereto as Appendix A.

## III. STATEMENT OF THE ISSUE IN THE APPEAL UPON WHICH REVIEW IS SOUGHT

WAS THE CITIZENS' UTILITY RATEPAYER BOARD AND THE RATEPAYERS WHOM THE BOARD REPRESENTS DEPRIVED OF THEIR DUE PROCESS RIGHTS TO A HEARING AFTER THE COURT OF APPEALS RULED THAT THE GAS PURCHASE AND TRANSPORTATION CONTRACTS WERE DEEMED APPROVED BY OPERATION OF LAW PURSUANT TO K.S.A. 66-117(b)?

## IV. STATEMENT OF FACTS

This case involves an appeal from a decision of the Commission in which KPP sought approval of certain gas purchase and transportation contracts entered into with WRI. On March 15, 1995, WRI filed an application with the Commission for approval of the contracts and for authority to recover related charges through its purchase gas adjustment clause ("PGA"). (R. Vol. 1, p. 1.) On March 31, 1995, KPP filed an application with the Commission seeking approval of certain gas transportation service agreements ("TSAs") between KPP and WRI. (R. Vol. 1, p. 5.) On that same date, KPP filed an application for approval and to make effective certain firm gas purchase contracts ("GPCs") between KPP and WRI. (R. Vol. 1, p. 63.)

Extensive hearings were conducted on the subject contracts over a period of several weeks. Prior to the hearing, extensive prehearing discovery was served by the applicants and intervenors. Twenty-four witnesses offered testimony the eleven days of the technical hearing.

The Commission had initially on April 20 and 21, 1995, entered several suspension orders suspending the TSAs and GPCs for not more than 180 days from the date of application. (R. Vol. 1, p. 143a and 143c.)

At the conclusion of the technical hearing, the parties were ordered to file post-hearing briefs. Subsequently, on November 1, 1995, Commission Staff filed a motion for stay of proceedings. (R. Vol. 26, p. 185.) That motion was based on a determination that had been made by the Federal Energy Regulatory Commission (FERC) that it had jurisdiction over the subject contracts because KPP constituted an interstate pipeline. On November 3, 1995, the Commission entered an order staying the proceedings. (R. Vol. 26, p. 208.) The Commission followed the November 3, 1995 order with a November 22, 1995 order wherein it ruled: (1) Subsequent procedural orders issued by the Commission superseded the original suspension orders issued in the case; (2) the November 3, 1995 order issued by the Commission was affirmed staying the consideration of these dockets until FERC had taken final appealable action; and (3) the 240-day time period (to the extent, if any, that it applies) was restarted as of November 2, 1995. (R. Vol. 27, p. 146.)

KPP petitioned for reconsideration of the November 22, 1995 order. That petition for reconsideration was denied on December 28, 1995. (R. Vol. 27, p. 184.)

KPP requested review of the December 28, 1995 order to the Court of Appeals. In a decision issued May 17, 1996, the Court of Appeals held that the Commission had not acted on the applications within the time period prescribed by K.S.A. 66-117(b) and, therefore, the contracts were deemed approved by operation of law. The Commission, CURB and

Williams Natural Gas ("WNG") have petitioned the Court of Appeals for rehearing. CURB now petitions this Court to review the decision of the Court of Appeals. Although captioned as a petition for review, this pleading may also be deemed a notice of appeal to the Supreme Court as a matter of right. Since a question under the Fourteenth Amendment arises from the Court of Appeals' decision, the appeal to this Court may be made as a matter of right. (See K.S.A. 60-2101(b).)

## V. ARGUMENT AND AUTHORITIES

### A. CURB And The Ratepayers It Represents Are Entitled To Due Process of Law.

The decision of the Court of Appeals has effectively denied CURB and the ratepayers which it represents their statutory right to inquire into the propriety of the gas purchase and transportation contracts that directly affect Kansas ratepayers. CURB has argued at various times during this appeal that the administrative process before the Commission, wherein the contracts were subject to extensive review, must be allowed to work, and that ratepayers are statutorily entitled to have the contracts considered in light of the wealth of testimony offered during the technical hearing which was conducted by the Commission. (CURB Brief at 15-16.) CURB further argued that the Court should not allow default to be taken against the ratepayers of the state by a strict reading of K.S.A. 66-117(b). That statute provides generally that the Commission must act on applications filed with the Commission within 240 days, unless certain conditions are satisfied.

The Court of Appeals' decision which upheld the application of K.S.A. 66-117(b) has denied Kansas ratepayers their fundamental due process rights. The Fourteenth Amendment to the U.S. Constitution provides in part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ."

Due process requires, when liberty or property rights protected by the Fourteenth Amendment are involved, the right to a hearing prior to the taking. Stoldt v. City of Toronto, 234 Kan. 957, 964, 678 P.2d 153 (1984). CURB and the ratepayers it represents have been precluded by the Court of Appeals' application of K.S.A. 66-117(b) from pursuing a meaningful hearing and have been deprived of a protected property interest.

B. CURB And Kansas Ratepayers Have A Protected Property Interest.

CURB is a creature of statute having been formed in 1989. (See K.S.A. 66-1222, et seq.) Operating through its Consumer Counsel, CURB is statutorily empowered to:

1. Represent residential and small commercial ratepayers before the State Corporation Commission;

2. Function as an official intervenor in cases filed with the State Corporation Commission, including rate increase requests;

3. Initiate actions before the State Corporation Commission;

4. Represent residential and commercial ratepayers who file formal utility complaints with the State Corporation Commission;

5. Intervene in formal complaint cases which would affect ratepayers; and

6. Make application for a rehearing or seek judicial review of any order or decision of the State Corporation Commission.

(See K.S.A. 66-1223.)

The thrust of the legislation was to create an advocate for residential and small commercial ratepayers in utility proceedings before the Commission. CURB has been empowered statutorily to pursue matters on behalf of ratepayers whenever ratepayers could be adversely affected by the decision of the Commission. The statutory foundation for CURB to protect the interests of ratepayers is solid. That statutory empowerment rises to the level of a protected property interest for Kansas ratepayers.

The ability of CURB to represent ratepayers is a constitutionally protected one in light of the decisions from the U.S. Supreme Court which establish the parameters for protected property interests. The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." A cause of action is a species of property protected by the Fourteenth Amendment's due process clause. Mullane v. Central Hanover Bank & Trust

Co., 339 U.S. 306 (1950). Here the Legislature has specifically created the authority for CURB to file causes of action on behalf of ratepayers before the Commission. K.S.A. 66-1222, et seq. creates a protected property interest in ratepayers. That property interest is protected by the Fourteenth Amendment's due process clause. The Court of Appeals' decision compromises CURB's right to intervene in and participate in matters pertinent to Kansas ratepayers. Ratepayers have had their right to participate guaranteed under K.S.A. 66-1223 extinguished without due process of law.

This deprivation is particularly egregious when one considers that CURB's right to pursue causes of action on behalf of ratepayers is taken away through no fault of CURB. The Court of Appeals failed to recognize that it is the ratepayers and not the Commission who ultimately would suffer the consequences of the subject contracts. Yet, the Court of Appeals would take away the statutory right of CURB to pursue such matters simply for the reason that the Commission did not purportedly issue a decision within the required timeframe. The application of K.S.A. 66-117(b) to the facts in this case results in constitutional harm being inflicted on unsuspecting ratepayers of the state. This deprivation requires reversal of the Court of Appeals' decision.

### C. Due Process Dictates That CURB Be Allowed A Hearing And A Decision On The Merits Of The Disputed Contracts.

Property rights once conferred by the Legislature cannot be withdrawn without due process of law. The Fourteenth Amendment requires as a matter of due process an

opportunity to be heard granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Where the state has conferred a property interest, that interest cannot be taken without constitutional, procedural due process. Kosik v. Cloud County Community College, 250 Kan. 507, 512, 827 P.2d 59, cert. denied 113 S.Ct. 195, 121 L.Ed.2d 138 (1992).

While the Legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. The adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. Vitek v. Jones, 445 U.S. 480, 490-491 (1980). Here ratepayers are granted a statutory right to participate in rate proceedings through CURB. CURB and its constituency were deprived of their statutory right to intervene and participate in an administrative proceeding conducted solely for the purpose of determining the prudency of certain contracts the burden of which would fall ultimately on ratepayers. The Court of Appeals' endorsement of KPP's suggested application of K.S.A. 66-117(b) deprives Kansas ratepayers of their statutorily granted property interest without due process of law. Some form of hearing is required before the owner of the property interest is finally deprived of such interest. Board of Regents v. Roth, 408 U.S. 564, 570-571 (1972).

It is the statutory scheme embodied in K.S.A. 66-117(b) that destroys ratepayers' property interest, by operation of law, whenever the Commission fails to act on an application in a timely manner. K.S.A. 66-117(b) is defective for constitutional reasons. The Kansas Legislature created CURB to serve as a watch dog for ratepayer interests.

The specific authority of CURB to maintain causes of action on behalf of ratepayers cannot be taken by the application of K.S.A. 66-117(b).

There is no public policy which would support the conclusion that ratepayers should have their right to challenge the subject contracts terminated by a technical application of K.S.A. 66-117(b) and through no fault of the ratepayers. CURB is entitled to have the Commission consider the merits of the contracts based upon the substantiality of the evidence.

In Logan v. Zimmerman Brush Co., et al., 455 U.S. 422 (1982), the U.S. Supreme Court held that a state may not terminate a complaining party's cause of action because a state official, for reasons beyond the complaining party's control, failed to comply with a statutorily mandated procedure. In that case, the complaining party brought an employment-related claim under the Illinois Fair Employment Practices Act. That Act provided that the Illinois Fair Employment Practices Commission had 120 days within which to convene a fact finding conference designed to obtain evidence, ascertain the positions of the parties, and explore the possibility of negotiated settlement. It was discovered that the hearing inadvertently had been scheduled after the expiration of the 120-day period. Through a strict application of the statutory language regarding the 120-day limitation, the complaining party's cause of action was dismissed by the lower court. The 120-day period was deemed to be jurisdictional.

Citing Mullane, supra, the U.S. Supreme Court held that the complaining party's cause of action was, in fact, a property interest protected by the Fourteenth Amendment. The Court held that the complaining party was entitled to an

opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Since the complaining party was denied that opportunity, the Supreme Court reversed.

The factual setting in the instant case is analogous to that in Logan. Here, the Legislature has created a statutory cause of action through CURB to protect and advance the interests of residential and small commercial ratepayers in the state. The decision of the Court of Appeals that the contracts between KPP and WRI have gone into effect by operation of law effectively deprives ratepayers of the state their cause of action without due process of law. K.S.A. 66-117(b) as applied by the Court to the facts of this case is unconstitutional. CURB is entitled to have its day in Court. The decision of the Court of Appeals should be reversed and the case remanded to the Commission for further proceedings. The ratepayers of the state should not be saddled with the consequences of these contracts, which have not been approved based upon their merits, by a technical application of K.S.A. 66-117(b). To do so would result in a deprivation of ratepayer rights simply for the cause of expediency.

CURB had previously asked the Court of Appeals not to abandon or ignore thousands of hours of staff work and hundreds of thousands of dollars of legal and technical analysis expended on the five contracts submitted for approval. The Court of Appeals rejected that plea. CURB now renews that request to this Court. The failure to allow the contracts to be considered based on the evidence introduced at the administrative hearing would run afoul of the constitutional due process principles enunciated in Logan.

## VI. CONCLUSION

In light of the arguments advanced above, CURB respectfully requests that the Supreme Court review the decision of the Court of Appeals, reverse that decision and remand the cause to the Commission for further proceedings.

Respectfully submitted,

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No. 96-956

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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CITIZENS' UTILITY RATEPAYER BOARD,
*Petitioner,*
v.
KANSAS PIPELINE PARTNERSHIP,
*Respondent.*

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

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## BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear Petitioner's claim, which was neither passed upon by, nor properly presented to, the Kansas courts?

2. Assuming this Court has jurisdiction, should it grant certiorari to consider a claim, repeatedly waived below, to correct the alleged denial of a state procedural right, when (a) the alleged right does not exist under Kansas law, (b) even if it did, long and well-established precedent of this Court establishes that Petitioner does not have the constitutionally-protected "property interest" it claims; and (c) Petitioner received far more process than was required in any event?

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Kansas Pipeline Partnership states that it is a general partnership and has no corporate parents or subsidiaries that have issued shares to the public.

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*Petitioner,*

v.

KANSAS PIPELINE PARTNERSHIP,
*Respondent.*

---

**On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

---

## BRIEF IN OPPOSITION OF RESPONDENT KANSAS PIPELINE PARTNERSHIP

---

Respondent Kansas Pipeline Partnership ("KPP") respectfully submits this brief in opposition to the petition filed by the Citizens' Utility Ratepayer Board ("CURB") for a writ of certiorari to review a decision of the Supreme Court of Kansas. The decision of the Kansas Supreme Court is unreported and reprinted as Appendix A to CURB's Petition.

The question presented in CURB's Petition is virtually identical to that presented in the Petition for Writ of Ceritorari filed by Williams Natural Gas Company ("WNG") on November 19, 1996 (Docket No. 96-778), which seeks review of the same Kansas Supreme Court decision. KPP filed a Brief in Opposition to WNG's Petition on December 19, 1996 ("KPP Opp."). To avoid

duplication, KPP has, where appropriate, incorporated by reference its Brief in Opposition to WNG's Petition.

## COUNTERSTATEMENT AS TO JURISDICTION

This Court lacks jurisdiction over the Petition under 28 U.S.C. § 1257, the statute invoked by CURB, because the question CURB presents was neither passed on nor properly presented to the Kansas courts.[1]

## COUNTERSTATEMENT OF THE CASE

### A. The Kansas Statutory Scheme

In March 1995, KPP filed five proposed natural gas contracts with the Kansas Corporation Commission ("KCC") pursuant to Kan. Stat. Ann. § 66-117. That statute requires a utility to file with the KCC any changes to its rates, charges, rules or practices, and allows the KCC to suspend the effectiveness of, and to hold a hearing on, the proposed changes. Hearings under the statute are discretionary. *See* § 66-117(b) ("[T]he commission . . . may give notice and hold a hearing upon such proposed changes."). Section 66-117 strictly limits the KCC's suspension power by providing a maximum period of suspension, and by mandating that the proposed changes be "deemed approved" if the KCC fails to issue a decision within that period. *Id.*

KPP incorporates by reference pages 3-5 of its Brief in Opposition to WNG's Petition, which provide a more detailed discussion of the Kansas statutory scheme.

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[1] Like WNG's Petition, CURB's Petition also seeks a writ directed to the wrong court. Because the Kansas Supreme Court's denial of CURB's petition for review was discretionary, CURB should have sought a writ directed to the Kansas Court of Appeals. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) (intermediate court of appeals is "highest Court of the State" under 28 U.S.C. § 1257 if state supreme court denies discretionary review).

**B. The Proceedings in This Case**

In response to KPP's filing, the KCC issued Suspension Orders under § 66-117 in April 1995, suspending the effectiveness of the contracts so that it could conduct a "full investigation of this matter, which *may* result in a hearing." (1 Rec. 143a, 143c) (emphasis supplied). CURB, an agency of the Kansas government authorized to intervene in certain KCC proceedings, thereafter moved the KCC "for an order permitting it to intervene in the . . . proceeding." (1 Rec. 178.) CURB's Petition for Leave to Intervene stated that

> CURB is requesting *permission* to intervene in this docket to represent the interests of Kansas Pipeline Partnership's residential and small commercial ratepayers. The rates paid and service received by those customers will or may be affected by the Commission order in this proceeding. (*Id.* at 179) (emphasis supplied).

Kan. Stat. Ann. § 66-1223 authorizes CURB to, among other things, employ a "consumer counsel" to represent residential and small commercial ratepayers before the KCC and to seek intervention in KCC proceedings.[2] As CURB's motion requesting "permission" for "leave" to intervene itself makes clear, this statute does not provide CURB any "right" to intervene. It merely authorizes CURB to act in a representative capacity before the KCC.

After CURB's petition to intervene was granted, CURB participated in the hearing with the same status as WNG and all other intervenors. In particular, CURB was subject to KCC regulations providing that its participation could be limited at the time intervention was granted, or "at any subsequent time," Kan. Admin. Reg. § 82-1-225(c), and that its admission as an intervenor "shall not be construed as recognition by the commission

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[2] The statute is App. I to CURB's Petition.

that the intervenor might be aggrieved by any order of the commission in the proceeding." Kan. Admin. Reg. § 82-1-204(i). *See* KPP Opp. at 21.

CURB was, in fact, far less active in the KCC proceeding than was WNG. In response to KPP's showing that the contracts at issue would advance competition and decrease costs to ratepayers,[3] CURB did not offer a single witness. CURB also chose to engage in only limited cross-examination of witnesses at the hearing, foregoing cross-examination of 18 of the 23 witnesses altogether. In sum, CURB offered no testimony to contradict KPP's showing that approval of the contracts was in the public interest.[4]

After the hearing was concluded, the KCC declined to rule within the statutory period. Acting on KPP's appeal, the Kansas Court of Appeals held that the KPP contracts were thus deemed approved as of the end of the KCC's statutory time period in which to act. *Kansas Pipeline*

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[3] For example, KPP demonstrated that (1) under three of the contracts at issue services would be priced at the *lower* of WNG's equivalent rate or KPP's existing KCC-approved cost of service based rate (1 Rec. 15-17, 32-35, 50-53, 152-6, 152-10; 11 Rec. 2643-6, 2643-8); (2) the already-existing contract would continue at KCC-approved rates for 5 years and then drop to the lower of those rates or the WNG price (1 Rec. 152-7; 11 Rec. 2643-9 to 2643-10); and (3) the remaining contract provided a flat rate consistent with KPP's KCC-approved terms and conditions (1 Rec. 152-38), and less expensive than the existing (WNG) alternative. (7 Rec. 259, 263-64, 270-75, 306, 326; 26 Rec. 47-52.)

[4] It has been recognized that a group's claim to represent consumer or public interests does not necessarily mean that its positions actually further those interests. For example, "in hearings before the Federal Power Commission on national gas prices, both sides had a legitimate claim to representing the consumer—one stressing lower prices and the other stressing the need to avert a shortage." Stephen Breyer, *Regulation and Its Reform* 352 (1982). Moreover, "the advocate may feel pressure to maintain a position that, when communicated through the media, will recognizably fall within the current stereotype of the public interest position." *Id.* at 353.

*Partnership v. State Corp. Comm'n*, 916 P.2d 76 (Kan. Ct. App. 1996). CURB, like WNG, then asserted for the first time that § 66-117 is unconstitutional, a claim that was untimely under Kansas law. Like WNG, CURB concedes that the Kansas courts did not consider its constitutional challenge. CURB Pet. at 4.

## SUMMARY OF REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to decide whether Kan. Stat. Ann. § 66-117 is unconstitutional because CURB repeatedly failed to present the issue properly in the proceedings below. In any event, CURB has failed to present "compelling reasons" for this Court to grant certiorari.

CURB contends that it was deprived of procedural rights due it as a intervenor under Kansas law when KPP's contracts were deemed approved by operation of law without a "determination on the merits." This Court, however, has consistently refused to hear claims alleging misapplication of state law. CURB also fails to identify any unsettled issue of law or conflict among the lower courts concerning such "deemed approval" provisions, which many states have adopted, and does not cite a single case even questioning the constitutionality of such statutes. Moreover, since the Federal Energy Regulatory Commission has recently announced it may assert jurisdiction over the KPP contracts at issue, the matter could soon well be moot.

CURB's "due process" claim is without merit. Under Kansas law, CURB had no right to a hearing or a "decision on the merits." CURB merely had the authority to seek permissive intervention in the KCC proceeding, which, once granted, can be limited by the KCC at any time and is subject to state law governing the proceeding, including the "deemed approval" provision. Moreover, under long-established precedent of this Court, no constitutionally-protected interest of CURB was implicated.

The Kansas ratepayers whom CURB claims to represent have no protected property interest in the rates to be charged under KPP's contracts; nor did CURB have any such interest in its ability to intervene. In any event, CURB was in fact heard in the KCC proceeding. Its Petition should be denied.

## REASONS FOR DENYING THE WRIT

CURB's Petition presents the same issue raised in WNG's Petition, and lacks merit for the reasons set forth in KPP's Brief in Opposition to WNG's Petition.[5] CURB, like WNG, failed to properly raise its constitutional challenge in the proceedings below to allow the Kansas appellate courts to pass upon the constitutional issue. *See* KPP Opp. at 15-16. CURB, like WNG, presents no unsettled question of law, and essentially claims a violation of state procedural rights, the type of claim this Court does not entertain. *Id.* at 16-18. CURB, like WNG, asks this Court to decide a question which may very well in the near future become moot. *Id.* at 19-20. Finally, like WNG, CURB and the Kansas ratepayers it claims to represent have no constitutionally-protected property interest that is implicated here. *Id.* at 20-24.

### I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR CURB'S PETITION

Like WNG, CURB failed to properly raise its constitutional challenge in the proceedings below, thus depriving this Court of jurisdiction to decide the question. CURB states in its Petition that it first raised its constitutional argument in its Petition for Review in the Supreme Court of Kansas. CURB Pet. at 4. WNG raised the issue for the first time in its petition for rehearing en banc before the Kansas Court of Appeals. Regardless of whether the issue was raised for the first time in the Kansas Supreme

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[5] KPP incorporates by reference pages 13-24 of its Brief in Opposition to WNG's Petition.

Court or in a petition for rehearing before the Kansas Court of Appeals, CURB's failure to raise the argument first before the KCC and then to the Kansas Court of Appeals before that court issued its decision deprives this Court of jurisdiction to decide the question. *See* KPP Opp. at 13-16.[6]

Applicability of the "deemed approval" provision of § 66-117(b) was squarely at issue before the KCC, *see* KPP Opp. at 11, and before the Kansas Court of Appeals, which termed it the "core question" of the appeal. 916 P.2d at 81. Kansas law makes clear that CURB was required to raise any claim that application of this statute would be unconstitutional to the KCC, Kan. Stat. Ann. § 66-118b, and again by cross-appeal to the Kansas Court of Appeals, if it wished to preserve that issue. *See In re News Publishing Co.*, 743 P.2d 559 (Kan. Ct. App. 1987) (constitutional issue waived where appellee did not raise it by cross-appeal, even though appellee prevailed on other grounds below). CURB was not permitted to wait and see whether the Kansas Court of Appeals would apply the statute, and then belatedly raise a constitutional challenge to it—this is a tactic the Kansas Supreme Court has stated "smacks of trial by ambush." *McVay v. Rich*, 874 P.2d 641, 647 (Kan. 1994).

## II. JUST AS KPP'S COMPETITOR WNG HAS NO PROPERTY INTEREST PROTECTED BY STATE LAW AND RECOGNIZED UNDER THE FOURTEENTH AMENDMENT, CURB HAS NO SUCH INTEREST

CURB overreaches in asserting that the Kansas legislature "created a statutory cause of action through CURB to protect and advance the interests of . . . ratepayers."

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[6] Indeed, in a related case involving Kan. Stat. Ann. § 66-117(b) now pending before the Kansas Court of Appeals, CURB once again failed to raise any challenge to the constitutionality of the statute in its appeal brief. *Western Resources, Inc. v. State Corp. Comm'n*, No. 96-77,681-A (Kan. Ct. App. argued Dec. 18, 1996).

CURB Pet. at 10. Far from "creating" a cause of action, CURB's authorizing statute simply gives CURB's consumer counsel the authority to represent certain ratepayers in specified types of proceedings. Kan. Stat. Ann. § 66-1223. This authority includes, in appropriate cases, the opportunity to seek permissive intervention under generally applicable intervention procedures.

A statutory grant of authority to seek intervention does not, however, rise to the level of a constitutionally-protected property interest. Indeed, even a statutory right to intervene does not create such an interest. *West Farms Assocs. v. Connecticut Traffic Comm'n*, 951 F.2d 469, 472-73 (2d Cir. 1991) (right to intervene in state proceeding does not create the "individual entitlement" necessary for a protected property interest). *See Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (*en banc*) ("[I]f state law establishes procedural entitlements, these are not themselves property and will not be enforced in the name of the Constitution.")[7]

Kansas law makes clear that a grant of intervention creates no protected "entitlement" or "property interest." Kan. Admin. Reg. § 82-1-204(i) specifically provides that "[a]dmission as an intervenor shall not be construed as recognition by the commission that the intervenor might be aggrieved by any order of the commission in the proceeding." The power to grant intervention "enables the commission to pursue a commendable liberal policy in permitting participation by parties desiring to intervene in commission proceedings." *Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n*, 473 P.2d 27, 30 (Kan. 1970). However, the intervenor's participation can be limited by the presiding officer "either at the time that intervention

[7] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), on which CURB relies, provides no support for its claim. *Logan* involved a plaintiff deprived of his own cause of action; CURB had no cause of action, and merely invoked a procedure to intervene in KPP's action.

is granted or *at any subsequent time*." Kan. Admin. Reg. § 82-1-225(c) (emphasis supplied).

A procedural privilege that is liberally granted absent any showing of individual entitlement, and that can be subsequently limited at any time, is the very antithesis of a "property right." Yet that is all that CURB had. *See* KPP Opp. at 20-24.

CURB purports to represent Kansas ratepayers who are KPP's potential customers, while WNG is a KPP competitor. Neither has any property interest protected by state law and recognized under the Fourteenth Amendment. State and federal courts have long held that parties other than a utility itself, specifically including ratepayers, have no property interest with respect to the utility's rates, and hence no right to a hearing or other due process with respect to changes in those rates. *See, e.g., Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537, 542 (1936) (natural gas customers have no vested rights in rates set by agreement between city and utility); *Crosby v. City of Jackson*, 813 F. Supp. 476, 477-78 (S.D. Miss.) (following "numerous cases holding that consumers do not have a protected property interest in utility rates encompassed within the scope of 'life, liberty or property' under the Fourteenth and Fifth Amendments"), *aff'd mem.*, 5 F.3d 528 (5th Cir. 1993); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa 1974) ("utility customers have no vested rights in any fixed utility rates," citing numerous federal and state cases). Kansas courts follow these cases. *Harrison v. Long*, 734 P.2d 1155, 1159 (Kan. 1987) ("Interests which have been held not to be protected by the due process clause include . . . utility rates . . . .")

CURB had no right to a hearing under Kansas law—both the hearing and CURB's own intervention were discretionary. Even if CURB were able to show it had a right to a hearing, it had no underlying property interest to be protected by such a hearing, and hence under well-

established precedent of this Court denial of any hearing right would not result in the deprivation of a constitutional right. *See* KPP Opp. at 23-24. Moreover, any right of CURB to be heard as an intervenor was necessarily limited by the deemed approval statute applicable to the KCC proceeding in which it intervened. *See Hukle v. City of Kansas City*, 512 P.2d 457, 463 (Kan. 1973) (intervenor accepts the proceedings as it finds them at the time of intervention). CURB's intervention was thus subject to KPP's statutory substantive right to have a decision or a deemed approval within 240 days.[8] In any event, CURB, like WNG, was in fact heard in the KCC proceeding and had every opportunity to urge its positions to the KCC and to the Kansas courts.

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[8] CURB seems to suggest that this Court could simply edit the 240-day limitation or the deemed approval provision out of the statute, or rewrite it in some other manner so that the KCC could retain the power to suspend or invalidate KPP's contracts without being subject to the time limitations on that power imposed by the Kansas legislature. CURB Pet. at 4-5. Such a rewriting of the statute would be convenient to CURB's argument, but is wholly contrary to the purpose and history of the statute and to Kansas law. *See* KPP Opp. at 18-19.

## CONCLUSION

For the foregoing reasons, CURB's petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 15, 1997

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No. 96-956

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

CITIZENS' UTILITY RATEPAYER BOARD,
*Petitioner,*

v.

KANSAS PIPELINE PARTNERSHIP,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

## RESPONSE OF WILLIAMS NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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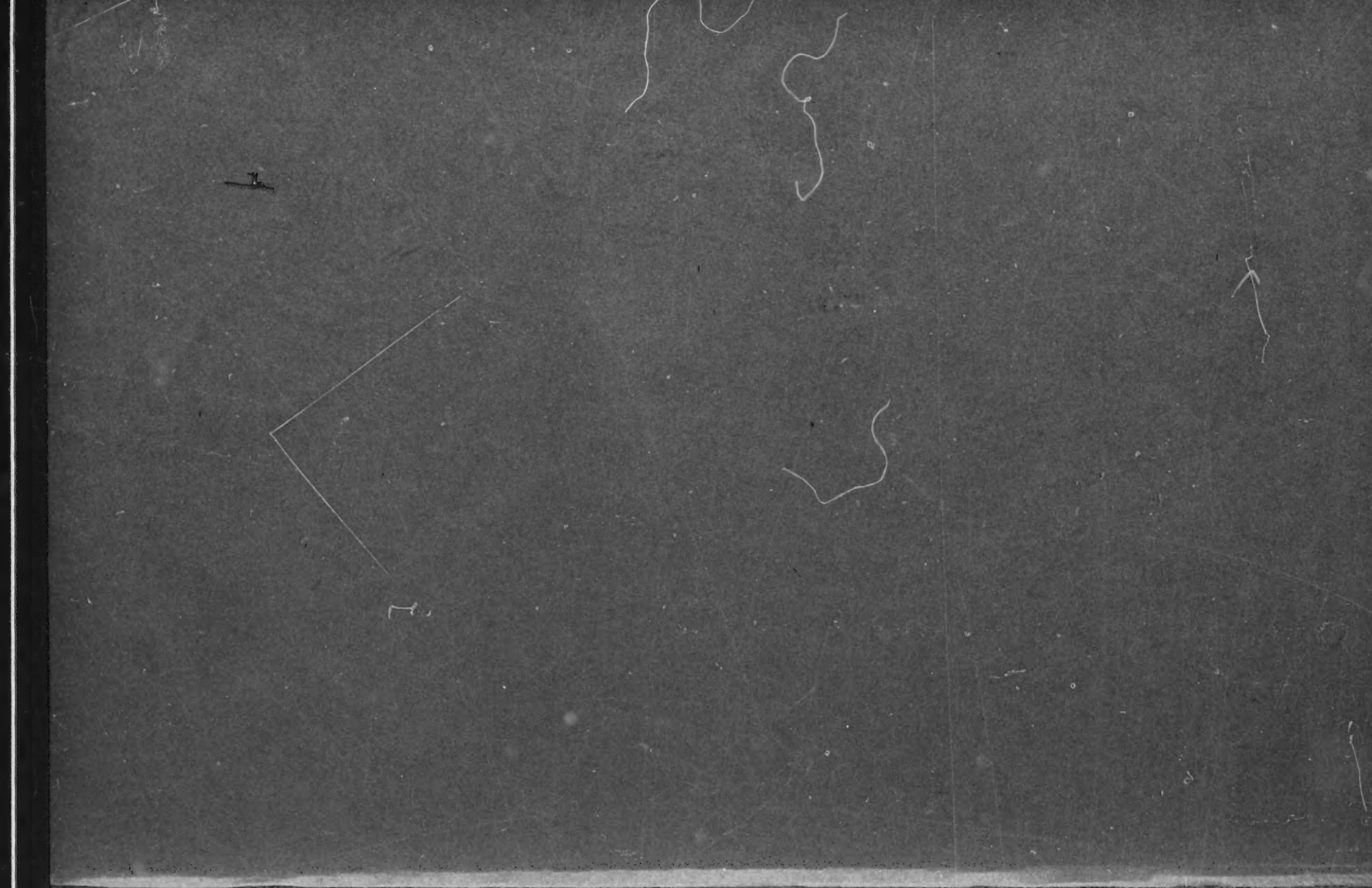

## RULE 29.6 STATEMENT

Respondent Williams Natural Gas Company is a wholly owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly owned by that corporation are as follows:

Altra Energy Technologies L.L.C.
American Soda, L.L.P.
Apco Argentina Inc.
Free Port Terminal Co. Limited
Kern River Gas Supply Corp.
Kern River Gas Transmission Co.
Kern River Service Corp.
Kiowa Gas Storage, L.L.C.
Nebraska Energy, L.L.C.
NES Supply Corp.
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
Parkco, L.L.C.
Pekin Energy Co.
Reserveco Inc.
TransNetwork Holding Co.
Tubexpress, Inc.
Williams Field Services-Gulf Coast Co., L.P.
Wiljet, L.L.C.

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CITIZENS' UTILITY RATEPAYER BOARD,

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KANSAS PIPELINE PARTNERSHIP,

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas**

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# RESPONSE OF WILLIAMS NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent, Williams Natural Gas Company ("WNG") files this Response in Support of the Petition for Writ of Certiorari filed herein by Petitioner, Citizens' Utility Ratepayer Board ("CURB"). WNG supports the issuance of a Writ of Certiorari to review an order of the Supreme Court of the State

of Kansas denying review of an order of the Court of Appeals of the State of Kansas ("Court of Appeals"), which held that the failure of the Kansas Corporation Commission ("KCC") to reach a decision on the merits of certain public utility applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) denied Kansas utility ratepayers the right to have the applications considered on their merits. Moreover, because this Petition raises the same issue WNG raised in its Petition for Certiorari in Docket No. 96-778, both Petitions should be granted and the matters consolidated for briefing and oral argument.

## STATEMENT OF THE CASE

This case arises from a decision by the KCC in a docket filed by Kansas Pipeline Partnership ("KPP") seeking approval of five contracts (the "Contracts") with Western Resources, Inc. ("WRI"). The KCC held extensive hearings after exhaustive discovery in which KPP, WNG, KCC Staff, CURB, WRI, and various other parties were active participants. All parties submitted briefs. Before the KCC could issue a final decision, the Federal Energy Regulatory Commission ("FERC") ruled that KPP is part of a single interstate pipeline system subject to FERC's exclusive jurisdiction under the Natural Gas Act.[1] Upon learning of FERC's assertion of jurisdiction, the KCC determined the new jurisdictional status was, in effect, an amendment of the application to approve the Contracts and, on that basis, restarted the 240-day statutory decision period, if that period even applied. Kan. Stat. Ann. § 66-117(b) (the "Statute") provides that various utility filings will be "deemed

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[1] KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61,160 (1995).

approved" if the KCC fails to act within 240 days. The KCC stayed further action in the consolidated dockets. KPP appealed to the Court of Appeals seeking a determination that the Contracts are deemed approved because the KCC failed to issue a final order within 240 days.

The Court of Appeals determined that the Statute's 240-day time limit applies to this matter and found that the Contracts are approved by operation of law. The Kansas Supreme Court declined to review that decision. WNG previously filed a Petition for Writ of Certiorari in Docket No. 96-778 raising, in the context of the same case, the same issue raised by CURB's Petition. The KCC filed a response in support of WNG's Petition. The Court should grant CURB's and WNG's Petitions and invalidate the unconstitutional interpretation of the Statute by the courts below.

## REASONS FOR GRANTING THE WRIT

CURB's Petition raises issues that clearly have broad impact on the citizens of Kansas.[2] The KCC filed a Memorandum in Support of WNG's Petition in the related Docket No. 96-778. CURB's Petition raises the same issue WNG raised in its Petition. CURB and the KCC are the parties charged with representing the public interest in receiving safe and economical natural gas service.[3] The KCC is responsible for reviewing and approving the rates charged by intrastate

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[2] This Response will not focus on the merits of the case, which are adequately covered by WNG's Petition in Docket No. 96-778 and CURB's Petition in this Docket. Instead, WNG will detail why the interests of the parties involved merit the Court's review.

[3] Kan. Stat. Ann. § 66-1223 (1996). Pet. App. I.

natural gas transportation companies and LDCs in Kansas. The Statute is part of the legislative framework that dictates the manner in which the KCC fulfills its statutory duty. CURB represents the interests of residential and small commercial ratepayers in Kansas. WNG is a significant interstate transporter of natural gas produced and consumed in Kansas and six other states. WNG, as a competitor of KPP and the major player in the portion of the interstate natural gas grid that traverses Kansas, has a significant interest in these Dockets.

The combination of the KCC, CURB, and WNG represents the many diverse parties that have a direct and substantial interest in this matter. Aside from KPP, all of the parties directly impacted urge the Court to grant certiorari to resolve an important federal question.

The state courts below "decided an important federal question in a way that conflicts with relevant decisions of this Court."[4] As detailed in WNG's Petition in Docket No. 96-778 and CURB's Petition in this Docket, the lower courts decided the issues before them in a manner repugnant to the 14th Amendment to the United States Constitution. A decision from the Court regarding this matter would have a tremendous impact on the citizens of Kansas and on the regulatory activities of the state of Kansas. More importantly, similar statutes in at least twelve other states would likely be impacted by the Court's interpretation of constitutional due process.[5] The

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[4] Sup. Ct. R. 10(c).

[5] Minn. Stat. § 216B.16 (2) (a) (Supp. 1995); Mo. Ann. Stat. § 392.230(5) (Vernon 1996) (telephone); Neb. Rev. Stat. § 19-4616(7) (1996) (municipal utilities); S.C. Code Ann. § 58-5-240(E) (Law. Co-op. 1995); Tex. Corps. & Ass'ns Code Ann. §§ 2.212(d), 3.211 (d), 5.08(d) (West

involvement of the KCC, CURB, and WNG in these related dockets makes it clear that the issues presented are of great importance. Because the issues deal with the application of the 14th Amendment to pervasive state regulatory schemes, this case raises an important federal question of first impression, which the Court should review.

This case is also important because it represents WNG's and CURB's sole opportunity for review of the denial of their right to due process. The parties have exhausted their state court review options and are precluded by the Johnson Act from seeking an injunction in federal court.[6] The Johnson Act prevents federal district courts from enjoining operation of state utility commission orders where:

> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,

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1995); Utah Code Ann. § 54-7-12 (3)(c) (1996); Vt. Stat. Ann. tit. 30, § 227(a) (1996); Wis. Stat. § 196.19(d) (1994). See Ala. Code § 37-1-81(B) (1996); Fla. Stat. ch. 366.06(3); 367.081(8) (1996); Idaho Code § 61-622 (1996); Me. Rev. Stat. Ann. tit. 35-A, § 310 (2) (West 1995).

[6] 28 U.S.C. § 1342 (1993).

(4) A plain, speedy and efficient remedy may be had in the courts of such State.[7]

Jurisdiction of this matter is based solely on the constitutional infirmity of the order of the Kansas Court of Appeals sitting in review of an order of the KCC. The agency action involves the intrastate transportation of natural gas in Kansas for sale to Kansas consumers and therefore does not interfere with interstate commerce. The KCC issued its order following notice and a hearing, albeit one that did not result in a decision on the merits. Finally, the parties had appellate remedies in the Kansas courts. Those appeals were incorrectly denied and resulted in WNG's and CURB's petitions to this Court. Thus, the Johnson Act's four criteria are met and WNG and CURB are precluded from pursuing injunctive relief in the federal courts. The fact that the Petitions filed by WNG and CURB are the sole remedy for the violation of Kansas ratepayers' due process rights emphasizes the importance of the issue raised.

## CONCLUSION

The Petitions in this Docket and Docket No. 96-778 raise an important federal question of great public interest. WNG urges the Court to grant the Petitions, consolidate the cases, and decide this important issue.

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[7] Id.

Respectfully submitted,

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*January 6, 1997*